TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 62.

ABRAHAM WOLFF, PLAINTIFF IN ERROR,

vs.

THE DISTRICT OF COLUMBIA.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

FILED APRIL 26, 1904.

(18,979)

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In the Court of Appeals of the District of Columbia

ABRAHAM WOLFF, Appellant,
vs.
THE DISTRICT OF COLUMBIA. } No. 1238.

a Supreme Court of the District of Columbia.

ABRAHAM WOLFF, Plaintiff,
vs.
THE DISTRICT OF COLUMBIA, Defendant. } No. 41533. At Law.

UNITED STATES OF AMERICA,
District of Columbia, } *ss:*

Be it remembered, that in the supreme court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:—

1 *Declaration.*

Filed October 27, 1896.

In the Supreme Court of the District of Columbia.

ABRAHAM WOLFF, Plaintiff,
against
THE DISTRICT OF COLUMBIA, Defendant. } At Law. No. 41533.

The plaintiff, Abraham Wolff, sues the defendant, The District of Columbia, a body corporate and municipal, duly constituted and existing under the laws of Congress; for that whereas (1) the said defendant before and at the time of the committing of the grievances hereinafter next mentioned was and is a body corporate and municipal in whom was then duly, legally and exclusively entrusted and vested the power and jurisdiction and the duty at all times to keep all and singular the several streets, including the sidewalks thereof, within said District of Columbia, open as public streets and passageways for all persons to go, return, pass and repass at their free will and pleasure, without molestation or injury, and without the defendant suffering or maintaining obstruction, nuisance or incumbrance therein to be made or to exist to safe travel by wayfarers. That

Louisiana avenue in the city of Washington within the aforesaid District of Columbia is, and at the time hereinafter mentioned was, one of the aforesaid public streets, and having a foot path or sidewalk along the north side thereof, for the ordinary and regular travel of wayfarers. That it was especially and exclusively within
2 the power and jurisdiction and was a part of the duty in that behalf of the defendant to keep and maintain the sidewalks of said city, including the aforesaid sidewalk and every part thereof, free from all obstruction, nuisances and incumbrances, and fit for safe travel of all wayfarers, including the plaintiff.

Yet the said defendant, well knowing the premises, while being vested and entrusted with said power, jurisdiction and duty, did, to wit, on the 27th day of October 1895 at Louisiana avenue in said city of Washington, and within the aforesaid jurisdiction of the defendant, in breach of its aforesaid duty, wrongfully, negligently and unjustly, and without taking any precautions whatsoever in the premises, allow and suffer a certain large stone several inches in height above the surface of said sidewalk, usually termed a carriage step, to be securely fastened into and to remain fastened into and to obstruct and incumber and impede that part of said sidewalk which was opposite and in front of a certain house to wit, known as No. 625 Louisiana avenue on the north side of said avenue, and part of the thoroughfare thereof and within the jurisdiction of the defendant, and did also then and there wrongfully, negligently and injuriously keep and contain the said stone and obstruction therein, and during the night-time of that day, and while said avenue or street was enveloped in darkness, without, as the defendant was then bound to do, fixing or placing or causing to be fixed or placed any light or signal at or near said stone, to denote or show that the same was so there as aforesaid, and without, as the defendant was then bound to do, fixing or placing any guard or screen around said stone, and without, as the defendant
3 was then bound to do, placing while said stone was so enveloped in darkness, any watchman or other person to warn wayfarers, including this plaintiff, of the existence, position and location of said stone, and without, as the defendant was then bound to do, doing some act or thing to warn wayfarers, including this plaintiff, of the existence, position and location of said stone; by means and in consequence of which said negligence, improper conduct and omissions of the defendant in that respect, and not otherwise, afterwards, to wit, in the night-time of the said day, and while the said stone was enveloped in darkness, and during the omission as aforesaid of each and all of the precautions as aforesaid on the part of the defendant, to wit, at or opposite and within 30 feet of the messuage to wit No. 625 on the north side of Louisiana avenue in said city, and on the aforesaid sidewalk, the plaintiff while lawfully passing along and over said sidewalk, and being justifiably ignorant of the existence of said stone, stumbled and tripped against, and fell over the said stone, and the plaintiff thereby and solely by means thereof, and not otherwise, and without any neglect or default on

his part, then and there became and was greatly hurt, bruised, cut, wounded, maimed and shocked, and had his right leg fractured and broken, and was hindered and prevented from attending to his lawful business of a bartender, and lost the gains and the profits which he otherwise and but for the aforesaid grievances would have made, and was put to great loss and costs in medical attendance, appliances and services in respect of the aforesaid bodily injuries.

4 Wherefore the plaintiff, all this considered, brings this suit and claims damages in the sum of $25,000.00 besides costs.

J. MILLER KENYON AND
DAVID M. NEUBERGER,
Attorneys for Plaintiff.

The defendant is to plead hereto on or before the twentieth day, exclusive of Sundays and legal holidays, occurring after the service hereof; otherwise judgment.

J. MILLER KENYON AND
DAVID M. NEUBERGER,
Attorneys for Plaintiff.

Amended Declaration.

Filed August 20, 1901.

In the Supreme Court of the District of Columbia.

ABRAHAM WOLFF, Plaintiff,
vs.
THE DISTRICT OF COLUMBIA, Defendant. } At Law. No. 41533.

The plaintiff, Abraham Wolff, sues the defendant, The District of Columbia, a body corporate and municipal, duly constituted and existing under the laws of Congress; for that whereas the said defendant, before and at the time of the committing of the grievances hereinafter next mentioned, was and is a body corporate and municipal and — whom was then duly, legally and exclusively entrusted and vested the power and jurisdiction and the duty at all times to keep all and singular the several streets, including the sidewalks thereof, within said District of Columbia, open as public streets and passageways for all persons to go, turn, pass and repass at their free will and pleasure, without molestation or injury, and without the defendant suffering or maintaining obstruction, nuisance or incumbrance therein to be made or to exist to safe travel to wayfarers. That C street northwest in the city of Washington within the aforesaid District of Columbia is, and at the time hereinafter mentioned, was one of the aforesaid public streets, and having a foot path or sidewalk along the south side thereof, for the ordinary and regular travel of wayfarers. That it was especially and exclusively within the power and jurisdiction and was a part

5

of the duty in that behalf of the defendant to keep and maintain the sidewalks of the city, including the aforesaid sidewalk and every part thereof, free from all obstruction, nuisance and incumbrances, and for safe travel of all wayfarers, including the plaintiff; yet the said defendant, well knowing the premises, while being vested and entrusted with such power, jurisdiction and duty, did, to wit, on the 27th day of October, 1895, at C street, northwest in said city of Washington, and within the aforesaid jurisdiction of the defendant, in breach of its aforesaid duty, wrongfully, negligently and unjustly, and without taking any precautions whatsoever in the premises, allow and suffer a certain large stone several inches in height above the surface of the sidewalk, usually termed a carriage step, to be securely fastened into and remain fast-
6 ened into and to obstruct and incumber and impede that part of said sidewalk which was opposite and in front of a certain house, to wit, known as Sae-gerbund hall between 3rd and 4½ streets on C street, northwest, on the south side of said street, and part of the thoroughfare thereof and within the jurisdiction of the defendant, and did also then and there wrongfully, negligently and injuriously keep and contain the said stone and obstruction therein, and during the night-ime of that day, and while said street was enveloped in darkness, without, as the defendant was then bound to do, fixing or placing or causing to be fixed or placed, any light or signal at or near said stone, to denote or show that the same was so there as aforesaid, and without, as the defendant was then bound to do, placing while said stone was so enveloped in darkness, any watchman or other person to warn wayfarers, including this plaintiff, of the existence, position and location of said stone, and without, as the defendant was then bound to do, fixing or placing any guard or screen around said stone, and without, as the defendant was then bound to do, doing some act or acts or other thing to warn wayfarers, including this plaintiff, of the existence, position and location of said stone; by means and in consequence of which said negligence, improper conduct and omission of the defendant in that respect and not otherwise, afterwards, to wit, in the night-ime of the said day, and while the said stone was enveloped in darkness, and during the omission as aforesaid of each and all of the precautions as aforesaid on the part of the defendant, to wit, at or opposite and within thirty (30) feet of the messuage to wit, No. 312 C street, northwest, on the south side of said street, in said city, and on the
7 aforesaid sidewalk, the plaintiff, while lawfully passing along and over said sidewalk, and being justifiably ignorant of the existence of said stone, stumbled and tripped against and fell over the said stone, and the plaintiff thereby and solely by means thereof, and not otherwise, and without any neglect or default on his part, then and there became and was greatly hurt, bruised, cut, wounded, maimed, and shocked, and had his right leg fractured and broken, and the same was so injured that it had to be amputated above the knee, and he was hind-red and prevented from attending to his

lawful business of a bartender, and lost his gains and profits which he otherwise and but for the aforesaid grievance, would have made, and was put to great loss and costs in medical attendance, appliances and services in respect of the aforesaid bodily injuries.

Whereof the plaintiff, all this considered, brings this suit and claims damages of the sum of twenty-five thousand dollars ($25,000.00) besides costs.

JOHN C. GITTINGS,
D. W. BAKER,
Attorneys for Plaintiff.

The defendant is to plead hereto on or before the twentieth day, exclusive of Sundays and legal holidays, occurring after the service hereof; otherwise judgment.

JOHN C. GITTINGS,
D. W. BAKER,
Attorneys for Plaintiff.

8 *Plea.*

Filed August 22, 1901.

In the Supreme Court of the District of Columbia.

ABRAHAM WOLFF, Plaintiff,
vs.
THE DISTRICT OF COLUMBIA, Defendant. } At Law. No. 41533.

The defendant for plea to the plaintiff's amended declaration, filed herein, says it is not guilty in manner and form as alleged.

A. B. DUVALL,
C. A. BRANDENBURG,
Attorneys for Defendant.

Joinder of Issue.

Filed September 20, 1901.

In the Supreme Court of the District of Columbia.

ABRAHAM WOLFF, Plaintiff,
vs.
THE DISTRICT OF COLUMBIA, Defendant. } At Law. No. 41533.

The plaintiff joins issue upon defendant's plea.

JOHN C. GITTINGS,
D. W. BAKER,
Attorneys for Plaintiff.

9 A. B. Duvall and C. A. Brandenburg, Esqrs., attorneys for defendant.

GENTLEMEN: Please take notice that the issues hereby joined, the cause being on the calendar, will be tried at the next term of court.

JOHN C. GITTINGS,
D. W. BAKER,
Attorneys for Plaintiff.

Memorandum.

January 15, 1902.—Verdict for defendant.

Supreme Court of the District of Columbia.

FRIDAY, *February* 28, 1902.

Session resumed pursuant to adjournment, Chief Justice Bingham presiding.

ABRAHAM WOLFF, Plaintiff,
vs.
THE DISTRICT OF COLUMBIA, Defendant. } At Law. No. 41533.

Upon hearing the plaintiff's motion for a new trial, it is considered that said motion be, and hereby is, overruled, and judg-
10 ment on verdict ordered: Therefore it is considered that the plaintiff take nothing by his suit, and that the defendant go thereof without day and recover against the plaintiff its costs of suit to be taxed by the clerk, and have execution thereof.

The plaintiff notes an appeal to the Court of Appeals, and the bond for costs on said appeal is fixed in the penal sum of one hundred dollars.

Memorandum.

March 7, 1902.—Appeal bond filed.

Memoranda.

April 18, 1902.—Bill of exceptions submitted to court and time to file transcript extended to June 2, 1902.

May 29, 1902.—Time to file transcript further extended to July 1, 1902.

11 Supreme Court of the District of Columbia, June 30, 1902.

ABRAHAM WOLFF
vs.
THE DISTRICT OF COLUMBIA. } At Law. No. 41563.

Now comes here the plaintiff by his attorneys and prays the court to sign, seal, and make part of the record his bill of exceptions taken during the trial hereof, and heretofore submitted, now for then, which is accordingly done.

12 *Bill of Exceptions.*

Filed June 30, 1902.

In the Supreme Court of the District of Columbia.

ABRAHAM WOLF, Plaintiff,
vs.
THE DISTRICT OF COLUMBIA. } At Law. No. 41533.

Be it remembered that at the trial of this cause on the 8th, 9th, 13th, 14th and 15th days of January, A. D., 1902, before the Honorable Edward F. Bingham, chief justice of the supreme court of the District of Columbia, and a jury empaneled and sworn to try the issue between the parties, the plaintiff, in order to maintain issue on his part joined, produced as a witness himself and testified as follows:

That witness' present age is thirty-five, and that on Sunday, October 27, 1895, he resided at 1827 14th street, where he was employed by a Mr. Kozal, and on that day in company with his sister-in-law, Mrs. Francis Wolf, his brother, William Wolf, and his sister-in-law's two children, about eleven o'clock in the day paid a visit to a Mr. Borchardine who resided in the country, and the party remained there until about five o'clock when they started to come to the city in a wagon owned by Mr. Seegar; that a board was put in the center of the wagon for the children to sit on, and the witness sat in front of the wagon with Mr. Seegar and Mr. Borchardine. Witness can hardly remember, but thinks he changed his position in the wagon on the way coming in. Witness does not know how far distant from the city Mr. Borchardine's place was but says it took almost three hours if it did not take longer than that to drive from there to Saengerbund hall, and it must have been around nine o'clock when the party arrived at Saengerbund hall. Mr. Seegar drove the wagon on the way back to the city. We stopped
13 at the Saengerbund corner and went in, only Mr. Borchardine and myself. My brother and my sister-in-law and the other party were sitting in the wagon and they would not come in. We went inside and bought one glass of beer and a cigar and came right out. We were not in the place five minutes because I hurried him out. I said we cannot leave them to sit out there. Being asked where the wagon stopped in reference to the Saengerbund hall, the witness said: Well, this is Saengerbund hall (indicating position) and the wagon stopped, if this was the step of the wagon, about that far from it (indicating) when we got out.

Q. Wait one moment. Take this post here (indicating) this gate post, in reference to the Saengerbund hall; and this opening is a street? A. Yes.

Counsel for the plaintiff then made a drawing of the locality and the witness indicated the location of the building by making a mark on the drawing and the witness stated:

I should judge the wagon came around from 4½ street and went east up C street and (indicating) when witness came out of the Saengerbund hall the wagon was on this side, on the 4½ Street side. It turned around, and the witness locates the wagon by making three marks on the drawing and states that the outside mark is the end of the wagon. The wagon was in here, not quite so far around.

Upon being asked to repeat this answer, witness said: The wagon stood not quite two feet away from the stone after I fell over it, the horse facing west towards 4½ street.

Q. Do you mean the rear end of the wagon or the side of the wagon from the stone? A. Certainly the side of the wagon, and the back was away from the stone.

14 Upon being asked whether there were any lights where the stone was, witness answers: "I could not say whether there was any light there or not. I could not say whether there were any lamps there or not; but it was dark, I know that; coming out of the light house it was dark naturally. There was no light whatever. The trees were in full bloom at the time and covered almost from one side of the street to the other and the first time I ever saw that stone was after I fell over it."

Upon being asked to state exactly how he fell, witness says: "Coming down the stairs and walking out in the street both toes stumbled, hit up against the stone, and over I went that way (indicating) right out into the gutter and I never knew there was anything the matter with me. I still had the cigar in my mouth and I caught myself on my hands, and I turned right over, just turned right over and could not get up until I was picked up.

The color of the stone was brown but I could not say the size of it. I never saw it at all before falling over it; but I had been there, I believe, once before, about nine months before that.

Mr. Borchardine and Mr. Seegar put me in the wagon and drove me to my home, and Dr. Kolopinski was sent for and he found that my leg was broken. I was in bed there about four months, then I stayed there a couple of months more, and then I went to New York, and then went to the Roosevelt hospital in 1896, about nine months subsequent to breaking my leg. Three months of that time I was walking around in New York trying to get cured; they were trying every which way to cure it and they found no cure, and all at once gangrene set in and they amputated the leg afterwards. I remained in the hospital close to three months."

15 Cross-examination:

I gave the information on which the suit was brought to Mr. Neuberger, my counsel in New York, and the information that Mr. Neuberger got was obtained entirely from me.

Extract from the original declaration, filed October 27, 1897, which stated that the injury occurred at Louisiana avenue, in the city of Washington, was read, and the witness was asked: Did you state that? and he answered, No, sir, I stated my whole case to Mr.

Neuberger and made terms with him upon which it should be prosecuted and told him in detail how the accident occurred. Told him where it occurred but did not tell him the number of the house; did not tell him it was on Louisiana avenue and did not know that the declaration was amended. The Sunday of the accident was a very bright day, a nice day. I should call the wagon a grocery wagon or a dayton wagon that we came back in. I know it was a sort of shaded wagon. I know they left the blinds down all the way coming back because it was kind of cool. There was a tail board to the wagon which was up. When we left Mr. Borchardine's place I could not tell you exactly how we were seated. Coming back we changed seats; I know that; we changed seats several times. On account of being pretty crowded up on account of there being five in the wagon and the two children, you know, so that we were pretty well crowded, so that we changed seats, I know that; and when we got in I really do not remember whether I was sitting in front of the wagon. When I got up I could not say whether I was in the front of the wagon or in the back of the wagon. Certainly I changed my seat and they all changed seats because we were crowded up. I was sitting in front with the driver, Mr. Seegar, when I changed my seat, and with Mr. Borchardine. We were sitting in front together and I changed my seat from the front
16 to the back of the wagon. Mr. Borchardine, Mr. Seegar and I were all three on the front seat when I changed my seat. I took my seat in the front of the wagon on the starting, coming away from the farm, and I changed my seat to the back. On the way coming down we stopped on the road. Mr. and Mrs. Wolf and the two children were in the back of the wagon. We stopped once before we reached the Saengerbund hall but I did not get out at any point before that. I believe I am sure I went out the back of the wagon. I cannot tell you what street we came down but we turned into 4½ street, although I had lived in Washington for about four years. The end of the wagon when I got out was past the entrance of the Saengerbund building but I really could not say how far, a foot or three feet or how far it was.

Q. Was this carriage step in front of the doorway or the entrance? A. Well, it seemed to me that I came right down from the middle of the entrance and walked right out towards the street to get in on the other side of the wagon and I fell right over there and it seemed to be about the center of the stairway. I could not describe the stairway down which I came though I had been there once previously, because I never looked at the building from the outside. It was a stone stairway with a stone or iron railing on each side and there was a vestibule to the doorway. There was no light in the vestibule that night but there was a light in the hall, on the inside. When I got out of the wagon onto the sidewalk and looked upstairs certainly I could see the doorway. I got on the wheel and got off the wagon. Certainly I stepped on the wheel and got off the wagon. Being asked which wheel he stepped on witness says: I was sitting in the back part of the wagon and must have stepped

on the back wheel. Being asked whether he got out of the
17 rear of the wagon, he says: Yes, sir, I think I did. I think I did get out of the rear of the wagon; no, not out of the rear of the wagon; the rear of the wagon would be the tail board. I could not say it was the tail end or the front; I might have stepped on the off side or the inside of the wheel.

Q. When you got out, did you get out of the front end, the tail end or the side? A. I got out of the side of the wagon. The shades were down certainly, they just hung down there and you lifted them up and got out. I lifted the shades certainly. They were not tightened shades, they just hung down. I lifted them and got out on the side. I did not get over the wheels. Certainly I put my foot on the wheel, but I could not exactly tell you whether it was a front wheel or a back wheel nor can I remember whether I was nearer the front or the back of the wagon. There was somebody sitting on the side of the wagon; not where I got off for I was sitting on that side myself. When I got out the driver was on the front seat and I don't know who was sitting with him now. I could not say where Mr. Borchardine was, whether on the seat in front or in the body of the wagon, and I cannot say which one got out first. I could not really tell you the truth, whether I got out in the street or on the sidewalk. I did not see the carriage step when I got off. I did not see any lamp on the other side of the street for I never looked there. The stars were shining and I knew it was a very bright night. Mr. Borchardine went up the steps to the Saengerbund first, and we were about one step apart. He opened the door and I went in with him. There was a light inside the building, in the hall, in the center of the ceiling, I suppose. I could not tell you
where it was exactly. There was a light, I know that. I came
18 out first. At least we both went out together and I opened the door comimg out and went down first. I could not say how far I was in front of Mr. Borchardine when I went down. I did not say whether he was downstairs or standing at the top of the stairs.

Q. How was it that you went ahead of Mr. Borchardine? You came out first? A. I wanted to get down in the wagon first. I wanted to give him a chance to get in the wagon, and I was going out in the street to get around the wagon to get in on the other side of the wagon so as to waste no time.

Q. So that you were hurrying to get down to the wagon first? A. Not exactly hurrying. I wanted to get down in the street and get in the wagon, so that I walked fast downstairs naturally, and I wanted to get home.

Q. You walked fast down the stairs? A. Came fast down the stairs.

Q. How many stairs did you come down, sir? A. I could not tell you how many stairs there were. I did not count them.

Q. Could you see the wagon from the steps when you came out of the house? A. You could see the wagon. It was dark. You could see the dark shade of the wagon.

Q. Did you notice that the wagon had changed its position? A. Did I notice that the wagon had changed its position? No, sir; I never took notice of it.

Q. It had changed its position, had it not? A. So I understand. I do not know whether it did or not.

Q. When you came out which way was the head of the horse,
19 towards 4½ street or 3d street? A. I could not say whether it was 4½ street or 3d street. When I came out?

Q. Yes. A. When I came out I walked downstairs and I never paid any attention to the horse at all. I came down to get in the wagon.

Q. You saw the wagon, didn't you? A. I saw the wagon.

Q. You say you hastened down to get around and give Mr. Borchardine a chance, did you not? A. Yes, sir; to get around the wagon.

Q. When you went into the house which way was the horse headed? A. Towards 3d street. Of course we came down from 4½ street.

Q. You say you hastened down to get around and give Mr. Borchardine a chance, didn't you? A. Yes, sir, to get around the wagon.

Q. And yet you didn't know whether the horse was headed towards 4½ street or towards 3d street? A. I could not exactly say which way he was headed.

Q. When you went into the house which way was the horse headed? A. Towards 3rd street, because we came down from 4½ street.

Q. You said, in your examination-in-chief, that when you came out the horse had changed—the wagon had changed and turned around, changed its position. A. It was further down. I don't know whether it turned or not. It was further down than when I went in.

Q. How far was the end of the wagon, the tail board of the wagon from the carriage step when you got out of the wagon?
20 A. I did not see the carriage step when I got out of the wagon.

Q. When you came down from the house, how far was the tail end of the wagon from the carriage-step? A. Well, I can hardly say, because I fell over it and laid in the street. I could not say. I could not just measure it. I did not see it at all, the carriage step at the time, or otherwise I would not have fell over it.

Q. You observed that there was a change in the position of the wagon? A. I am not sure. I would not say that there was a change or not.

Q. Didn't you say so a little while ago? A. I don't know whether I said——

Q. Didn't you say——

Mr. BAKER: Just let him answer.

By Mr. DUVALL:

Q. Didn't you say so just a little while ago? A. I believe I did say so a little while ago.

Q. Didn't you mark it on this paper, the changed position? A. No, sir.

Q. Where the end of the wagon was when you got out? A. Yes, sir.

Q. And where the end of the wagon was when you came out of the house? A. Yes, I marked it; but I only marked that as suppositious; I didn't know exactly.

Q. When you came out you observed that the wagon had changed its position, didn't you? A. Yes, sir.

21 Q. And the position had been changed as you marked it on this paper? A. I would not say for sure whether it was or not.

Q. Didn't you testify that it had been changed and was standing as you have marked it there (indicating on drawing)? A. If I marked it there I must have testified to it.

Q. Didn't you mark it there? A. Yes, sir.

Q. Didn't you say so? A. Certainly I must have said so if I put it down there.

Q. Why did you say so if it was not so? You told the truth about it, didn't you? A. I thought I told the truth. I ain't sure of it now.

Q. How many steps did you take at the foot of the Saengerbund steps—how many steps on the sidewalk—before you struck the carriage step? A. I could not tell you how many steps I took.

Q. Well, did you take two? A. I could not say whether it was two, three or four.

Q. Or five or six? A. I could not say how many steps it was. Of course I have not——

Q. Why can you not tell us that? A. I never count my steps as I walk.

Q. You don't know how many steps you took? A. No, sir; how could I remember?

Q. You were hastening along to get to the wagon? A. Not exactly hastening, I was going in a hurry.

Q. In a hurry? A. Yes, sir, not hastening.

22 Q. You saw where the wagon was when you reached the sidewalk? A. When I reached the sidewalk I struck the stone and away I went.

Q. How many steps did you take before you hit the step? A. I could not tell.

Q. Did you hit the stone as soon as you hit the sidewalk, or did you reach the gutter? A. I hit the stone when it was out in the gutter—no, sir not as soon as I hit the sidewalk.

Q. When you hit the sidewalk you had to take some steps? A. Certainly, before I hit the gutter.

Q. You hit the carraige step, didn't you? A. Yes, sir.

Q. And you don't know how many steps you took? A. I haven't any idea.

Q. When you reached the sidewalk, I want to know if you didn't see the wagon? A. Certainly, I saw the wagon.

Q. Certainly you did. How far was it from you? A. From me?

Q. Yes. A. The width of the sidewalk.

Q. How far is that, compared with the distance from you to me? A. I don't know exactly how long the sidewalk is. I have not seen that sidewalk in some time. I don't remember whether it is a wide or a narrow street.

Q. You don't know; is that it? A. I could not tell you whether it is a wide street or a narrow street.

Q. About how far; as far as from you to me? A. No sir, I do not think the sidewalk is that wide.

23 Q. Not as far as that? A. No, sir.

Q. Was this carriage step right in the line from where you were on the sidewalk to the wagon that you were going to get into? A. No, sir; the carriage step was right in the line where I came down the steps, and right straight out.

Q. Out to the wagon? A. The wagon was not standing there. If the wagon had been standing there I could not have fallen out in the street.

Q. The wagon was further down towards 4½ street? A. I don't know now whether it was 4½ street or down towards 3rd street.

Q. You don't know which way it was? A. No, sir.

Q. You knew a little while ago? A. I don't know for sure; I could not say for sure which way it was.

Q. After taking some steps, hurrying along, you are unable to tell us how many steps, you say that both feet struck the carriage step? A. Both feet, just the toes, like, struck the carriage step, and over I went.

Q. Will you explain to the jury how, if you were walking along, those toes could strike the carriage step at the same time? Ordinarily one foot goes before the other. A. Certainly, if you make one step right to it, and it is there, and then you go to put the other foot out and then you hit, and over you go.

Q. Isn't it a fact that you were hastening—running? A. I was not exactly running; I was walking fast.

Q. Trotting? A. No, sir; not trotting, just walking fast.

24 Q. When you struck, both toes struck the carriage step, you say, and it was a brownstone carriage step? A. I said it was brown, because I heard that afterwards, that it was a brown step. Of course I don't know.

Q. It was the ordinary carriage step that we have in the city here? A. I could not tell whether it was an ordinary carriage step or just a brownstone step.

Q. Don't you know that it was the ordinary carriage step that we have here? A. I didn't see it.

Q. Didn't you see it after? A. What?

Q. You saw it, didn't you? A. After I fell over?

Q. Yes. A. I didn't have time to turn around and look at it. I was told that it was brown. I said the stone was brown because I

heard that afterwards; of course I don't know. After I was laid up in bed somebody came and told me. It was a bright moonlight night and the trees were pretty full but I did not count them. I could not say whether the trees were in front of the premises or alongside of the premises. I know there are a plenty of trees through that street. The leaves were just starting to flutter off. I saw them driving down on the wagon. I could see out of the end and back of the wagon as I drove along that the trees were in full bloom on C street.

Q. When you fell, how far did you go from the carriage step? A. I fell right over it; right in the gutter; and kind of raised myself right on my hands; I caught myself on my hands. I fell
25 right out in the street. I could not say whether the carriage step was in a line with the steps or not.

Q. Did your body go into the roadway? A. Right into the street. Right out into the middle of the street.

Q. Your feet were in the street? A. Certainly after I fell over it.

Q. Did your feet land out in the roadway? A. Certainly. After I was struck I was not going to lay up there.

Q. Then do I understand that you fell over and struck the stone and pulled yourself right out into the street? A. No, I did not say I pulled myself out into the street at all, sir.

Q. Where was it that stone hit you? A. Right here (indicating a position in front of the leg midway between the knee and the end of the groin) that is where the break was in the thigh more than six inches above the knee-cap. When I tried to get up, my feet were in the street and I was lying straight out from the curb right towards the other side of the way. The driver came off the wagon as Mr. Borchardine came down, right down the steps after me. He was not in the wagon.

Q. You did not see the carriage step? A. Certainly not, if I had seen it I would not have fallen over it.

Q. If you had looked when you got out of the wagon to go into the Saengerbund, you could have seen that carriage step, could you not? A. I don't know, I never looked.

Mr. GITTINGS: I object to that.

A. (Continuing:) I never looked down into the street; I looked ahead. I always do look ahead when I walk.
26 Q. If you had looked when you came down from the steps you could have seen the carriage step, could you not?

Mr. BAKER: I object, if the court please.

Mr. DUVALL: Why?

Mr. BAKER: The witness has testified that he came down there and did not look, and walked out; and the question of whether if he had looked what might have happened has absolutely nothing to do with this case. The question involved in this case is, in the first place, the negligence of the defendant, and in the next place, if they want to show the negligence of the plaintiff, they ought to show

that he had notice of this defect, and the mere fact that he did not look on this occasion has nothing to do with the question of negligence at all.

The COURT: What he did on this occasion is evidence.

Mr. BAKER: That is right, but not what he could have done.

Mr. DUVALL: Here is a man—I speak now of the last question—who when he came out of the Saengerbund stood facing the wagon, and just below him, and in his line of vision, unobstructed, was this carriage step. Now, I ask this witness if he had looked, if he had observed what he was doing, could he not have seen that step? That is a perfectly competent question.

The COURT: You can answer the question.

Mr. BAKER: We note an exception, your honor.

The WITNESS: Shall I answer the question?

Mr. DUVALL: Yes.

The WITNESS: Certainly I saw the wagon. I could see the wagon; it was high.

Mr. DUVALL: That is not my question.

The stenographer read the question as follows:

Q. If you had looked when you came down the steps, you
27 could have seen the carriage step, could you not? A. Not if I looked ahead of myself. Not if I looked straight out.

Q. Were you intending to fly or to walk? A. No sir, it was dark, I could not see that step.

Q. If you had looked in the direction in which you intended to walk, could you not have seen the carriage step? A. In the direction? No sir, I do not think I could.

Q. Why not? A. Because it was dark. Certainly, if I was standing on the sidewalk and looked, I think I could have seen it if I had looked down.

Q. Exactly. When you reached the sidewalk after you had left the steps? A. Yes sir.

Q. If you had looked in the direction in which you were going, could you have seen the carriage step? A. No sir; I did look in the direction in which I was going, but I was looking right out before me.

Q. What were you looking at? A. I was looking where I was walking.

Q. How were you walking, on the ground? A. What?

Q. If you were looking where you were walking you ought to have been looking on the ground? A. No sir.

Q. What were you looking at? A. I was looking right straight ahead, not with my head down.

Q. Right straight ahead? A. Yes, sir.

Q. At what object? A. Not at any particular object at all.

Q. You were going to the curbstone were you not? A.
28 Yes sir; going to walk out into the street to get around and get into the wagon.

Q. And you intended to go into the roadway and get into the wagon? A. Into the wagon, yes sir.

Q. Did you look in that direction? A. Yes sir, certainly; that is the direction I was looking in.

Q. Did you look to see whether there was a gutter there? A. Certainly, I knew there was a gutter there.

Q. You knew where that was; you could see that, could you not? A. No sir, I could not exactly see it, but I could feel at it. If it was a straight road you can always see a gutter. I could see the middle of the street.

Q. And you knew that you had to go to the gutter? A. Yes sir.

Q. Why did you not look to see where that was? A. I did not walk out and look right on the ground.

Q. You made no observation at all of the point where you put your feet, knowing that you had to come to the curb and to come to the gutter; but you did not look at all; is that it? A. Certainly I looked. I could not see any stone there though. When I went to New York city I was walking on crutches.

On recross-examination certain *paragraphs* were shown by counsel for defendant to counsel for plaintiff and thereupon counsel for plaintiff said:

I will consent that those pictures shall go in evidence. One of said pictures, being a photograph of the Saengerbund house,
29 was shown to the witness who testified that he recollected seeing the building, except that he did not recollect the decorations thereon which were shown in the photograph, and that the building looks that way outside of the decorations. Counsel for plaintiff, thereupon, admitted that photograph shown was the photograph of the building and that it showed the carriage step; and thereupon witness, continuing, said: On the occasion of the injury it seemed to me as though it (carriage step) was almost in the center of the building. The photograph, showing carriage step and building, was exhibited to the jury.

Thereupon, to further maintain the issues on his part joined, the plaintiff produces as a witness Mrs. FRANCIS WOLFF who testified as follows:

That on Sunday, October 27, 1895, the witness in company with her husband, two children and the plaintiff, paid a visit to the country place of Mr. Borchardine where they remained between seven and eight o'clock and returned to the city of Washington in a light wagon, a grocer wagon or something, with chairs inside for the people to sit on, driven by Mr. Seeger, and with witness' husband and child, herself and child, Mr. Borchardine and the plaintiff inside; that it took about an hour or a little more to get into the city: when the party arrived in the city the plaintiff was sitting opposite to the witness and the wagon stopped at Saengerbund hall on C street and Mr. Borchardine and the plaintiff got out. The plaintiff got out of the back of the wagon and remained in the hall five or ten minutes. When he came out he came down the stairs and fell over—he came down the stairs and fell over a stone and flew right in the middle of the street. Witness was sitting in the

back of the wagon, the last seat in the back, and could not see the steps of the Saengerbund hall from where she was sitting, could see up the steps. The wagon was not slanting but the witness
30 was sitting slanting. The wagon stood parallel to the sidewalk and witness is not positive but thinks the horse stood facing towards 3rd street, about a couple of feet from the steps of Saengerbund hall. The night was clear but the street on our side was dark. Witness did not see the stepping stone before the plaintiff had fallen over it, but looked at it afterwards. It was about ten or twelve inches high, witness thinks, and the width was about the same, and in length about 2½ to 3 feet, but witness is not sure.

Q. Now state whether or not there was any light cast upon this stone.

Mr. THOMAS: That is a leading question.

A. The only light, as I have said, was from the hall window of the Saengerbund, and that was very little.

Q. Was there any gas lamp or street lamp near the place? A. As much as I can remember there was one, across the street, but there were trees between.

Q. What was the condition of the trees at that time? A. They had leaves on. The manner in which the plaintiff came down the steps of Saengerbund hall is this: He came down the steps the same as—like any one would—like any one would walk down the steps quickly; he was walking down the steps towards the street to get into the wagon and fell over the stone and flew right in the middle of the street. The witness did not see that the plaintiff was looking. There was not any light reflecting on the stone. The light from across the street was to the middle of the street. I could see very plain where he had fallen after he fell. The light across the street was between the trees. I know that because of the reflection of the light. You could see the leaves on the middle of the street from the reflection of the light, and the wagon was a
31 little distance from the stone when they came out. The wagon did not have much light. In reference to the light across the street the wagon was located towards 3rd street when the parties went in. Witness did not observe the stone as the plaintiff went in the hall. Witness did not remember the exact position of the wagon when the plaintiff went out of it. When plaintiff came out of the hall the back of the wagon was about two feet from the carriage stone and it was parallel with the sidewalk.

Cross-examination:

The wagon had a seat in front, a cross seat and chairs in the back. We sat on chairs, I believe; the others sat on boxes; that is, my husband and myself each had a chair and the others sat on boxes inside of the wagon. Mr. Borchardine was in the front towards the driver but no one sat with Mr. Seeger on the front seat. The curtains were down inside of the wagon so that it was completely dark

inside of the wagon. We had no light. The floor of the wagon was about a yard from the ground and it had a small tail gate. The witness did not notice the streets going to the Saengerbund hall. Doesn't remember whether they came up 4½ street or 3rd street. When we got to Saengerbund hall that night, witness says, I cannot tell how the team was facing. Plaintiff got out of the tail end of the wagon. After plaintiff and Mr. Borchardine got out of the wagon it moved a little towards the end (indicating) it made it straight with the sidewalk, but witness cannot tell whether it got further away from Saengerbund hall or not by doing that. Witness does not recollect how the wagon stood when they got to Saengerbund hall. Witness faced the tail end of the wagon and the back of the wagon was a little distance from
32 the stone up parallel to the sidewalk, about two feet. The wagon did not turn around, did not go any distance away, just straightened out, and when witness says it moved a little, by "a little" she means until the wagon was straight with the sidewalk but doesn't know how it was moved. Witness could not see through the curtains in the wagon. Witness was on the side of the wagon facing Saengerbund hall, the last seat of the wagon. The seats were never moved. Witness saw plaintiff come down the steps of Saengerbund hall. Plaintiff came out first and Mr. Borchardine came back of him. The plaintiff came down quickly, like any man would come down the stairs, and struck the carriage step, walked right straight out and flew into the middle of the street about three or four feet from the curb. He fell over the stone and flew right out into the middle of the street, clear into the roadway. When the plaintiff fell Mr. Borchardine was on the Saengerbund steps but witness does not think he was on the top landing. Photograph shown witness who says that the position of the carriage step on that night is the same as shown in the picture. Mr. Borchardine at the time the plaintiff fell was on the upper portion of the stairs, and at that time the plaintiff had come down and stripped over this stone step. (Witness indicated on the photograph how far the plaintiff fell out into the street. Makes a mark on the photograph showing how far plaintiff's feet were out in the street.) The plaintiff was about three or four feet from the tail end of the wagon when he lay in the street, and witness thinks Mr. Borchardine was still upon the steps. Mr. Borchardine and Mr. Seeger picked the plaintiff up. Witness could see plaintiff as he lay there but not very well. There was a gas light across the street with trees between the gas light and the body and there was a little light
33 coming from Saengerbund Hall vestibule, a very little. Witness does not think there was a light in the vestibule but there must have been glass doors in the vestibule through which a little light came. When witness looked out of the wagon at the stone, the witness was about two feet from the stone. Witness says she cannot tell whether after the wagon first stopped at the Saengerbund hall and the plaintiff and Mr. Borchardine had gotten out and gone into the hall, the wagon turned around and stood facing

in the opposite direction. Witness was asked whether she had not testified when her deposition was taken on the 13th of September, 1901, that the plaintiff was lying about 6 or 7 feet off from the curbstone in the street, and states that she made such a statement but that she thought it over since and does not think it could possibly be as much as 6 or 7 feet because that would be too far over and that the plaintiff was somewhere out in the street. Witness further testified that she did not know how the wagon stood when the plaintiff went into Saengerbund hall but knows how the wagon stood after the plaintiff had fallen, and that she now thinks it was standing towards Third street.

Q. Mrs. Wolff, did you notice any trees in front of the Saengerbund? A. No sir, I did not notice them.

Q. Did you notice any trees on the opposite side of the street? A. I noticed trees on the other side of the street.

Q. With respect to Saengerbund hall were they directly opposite or were they diagonally opposite? A. I cannot tell; I noticed the trees, that I know. The light must have been from the back of the trees.

34 Q. Why? A. Because it was not a bright light. I guess it was from behind the trees. Witness says she cannot tell what kind of trees they were, whether they were tall trees or short trees, nor can she tell where the lamp post was that was across the street, that is, not the exact place.

Q. You saw him fly through the air? A. Yes sir, I saw him fly.

Q. Did he make a clean sweep? A. He did not touch anything else before he fell.

Q. Then he simply struck the carriage step and flew right out into the middle of the street; is that right? A. That is as much as I can remember, yes.

Q. He did not strike the carriage step and fall right over into the gutter? A. No, sir.

Being asked with what speed plaintiff came down the steps, witness says he came down quickly. That is the only way I can explain myself.

Q. What do you mean by saying "quickly"? A. What I said before, the same as I meant it then, like any man would come down the steps. They don't walk slowly.

Q. Did he walk slowly across the pavement? A. I don't know how he walked across the pavement; I don't know about the pavement. I seen him come down and saw him fly from the carriage step into the street, that is all I know.

Thereupon, to further maintain the issue on his part joined, the plaintiff produced as a witness OTTO BORCHARDINE who testified as follows:

That he is a resident of the District of Columbia; that the plaintiff on the day of the accident came to his place at Suit-
35 land, Maryland, in company with Mr. and Mrs. Wolff and their two children; that they remained there until about 7.30 in

the evening; that the witness, the plaintiff, Mr. and Mrs. William Wolff and their two children drove in town in the wagon of Mr. Seegar; Mr. Seegar drove the wagon and no one sat on the front seat with him. There were two temporary seats put up on the sides of the wagon and a box and a board or it might be chairs. Mr. and Mrs. Wolff and the two children and the plaintiff and witness were in the rear of the wagon; and it took about an hour and one-half to drive from his place and the party arrived at Saengerbund hall about half past eight or nine o'clock in the evening; that plaintiff and witness went out of the wagon and went up the stairway and took one glass of beer and one cigar and stayed there about five minutes and came right out "because we would not let them peoples wait, you know." Plaintiff came out first and witness shut the door. When plaintiff came out he went right fast down the stairway, and the next thing I saw I was standing on the platform and saw plaintiff fall over that carriage step, and I said to him, "What's the matter here, why don't you get up?" He said he could not, and I rushed down the stairway at the same time that Mr. Seegar came from the front seat, and we picked him up and put him in the wagon. Plaintiff was about five or six feet from the curb and as he is not very tall it might be one of his feet was one foot from the curb or 18 inches, I could not say.

Q. State where this wagon stopped with reference to this stone when you got out. A. The wagon turned up there. For instance, there is a stone and the stone was right in between the two wheels, to my recollection, and when we came out of course the horse had moved in the meantime, and the stone was really on the back part of the wagon, the end of the wagon. The street was very
36 dark, according to my knowledge, and there was no light shining on this stone that I saw. I guess it was a brown stone and the size might be about 22 or 24 inches in length by 10 or 12 inches high, and 16 or 18 inches wide.

Q. How long had that stone been there, Mr. Borchardine, if you know? A. I have been a member of the Saengerbund, I guess, since 1889, and at the time we moved down there from Mr. Dismer's place I remember I saw that stone every day when we went to rehearsal. We moved down there, I think, in 1892 or 1893. The pavement was red brick and I think there were some trees right there. There is a light near the alley on the same side with the Saengerbund hall, between the Saengerbund hall and the alley, but I could not say whether there is a tree right there in front of the Saengerbund or not. There is a light on the other side of the street only, slanting from the Saengerbund nearer to Third street, in reference to Saengerbund hall in about the middle of the square. That light could not have shone on the stone because the wagon was right in front and the light could not be on the stone. Witness had noticed the stone many times before the accident but did not take any notice of the stone that night. When the witness and the plaintiff got out of the wagon they jumped over the tail board. Plaintiff did not get out from the side of the wagon and

step on the wheel. He could not have done that because there were two curtains on the side. The tail board is fastened with a spring and we got out and jumped down. The tail board was let down and we both jumped down. When the wagon was being driven into the city it did not stop at any place before Saengerbund hall was reached, nor did the parties in the wagon change their seats that I know of. To my knowledge the plaintiff and
37 myself were seated in the rear part of the wagon, and it took but an hour and a half and not three hours to get in from my place, which is at Suitland, Prince George's county, Maryland.

Q. That carriage step was there all the time that the Saengerbund had been there, was it not? A. Yes, sir.

Q. Could you tell us, give us an idea of about how many people visited the Saengerbund, generally speaking, in a season, who came in carriages? A. Sometimes there was one or two or three teams standing out in front and many times my wife and myself drove in from the country and we would only stay an hour or so and we left the horse standing outside. The stone was lying right about in the middle of the stairway and the wagon stopped so that the stone was just about in between the two wheels. If a man had stepped out of that wagon on the hind wheel he would not have stepped on the carriage step because it was in between the wheels. The carriage step would have been beyond him nearer the horse's head. The space between the two wheels of that wagon might be about two feet. Mr. Haglman was the doorkeeper of the Saengerbund, but he is dead now.

Q. How near the carriage step were the wheels of the wagon when you got out of it? A. It was right straight there, right on the curb, snug against the curb. I could not say whether the wagon was straight or diagonal because I never took any notice of it, of whether it was turned around a little bit or not. When we got out of the wagon we could see the steps of the Saengerbund, and there is a lamp in the vestibule, but I could not tell you whether it was burning that night. There is always a light in the hallway and it
38 throws enough light to see the Saengerbund door. Mr. Wolff came out first.

Q. Where did you stand when he was going down the steps? A. I was on the platform because I shut the door and I was the last one and I was just about at the platform, on top, when I saw Mr. Abe Wolff roll over the stone. (Photograph of the premises shown witness and then exhibited to jury,) and witness indicates where he was standing, saying: I was there with intent to go down the stairway. I was not standing, I intended to go down the stairway and at that same moment I saw Mr. Abe Wolff fall. I was about to go down the stairway.

Q. Where was he when you saw him? A. He fell right over the carriage step.

Q. Had he struck it when you saw him? A. The only thing I saw was his whole body fly right over.

Q. He was flying over when you started to go down? A. Yes.

Q. Did you see him going down the steps? A. Yes.

Q. How was he going? A. Right fast.

Q. Was he walking or running? A. You cannot run down the steps.

Q. If anybody can run down the steps, was he running? If it is possible? A. You cannot run down; he was only going right fast.

Q. It does not make any difference how fast a person comes down the steps, you would still call it not running? A. Not running.

Q. When you saw him out that way, having fallen, you
39 cried out to him, did you not? A. Yes; I said, "Get up," and he answered, "I can't."

Q. That is before you had left the top of the steps? A. No. In the meantime I came down the steps, and I seen him lying there and I rushed as quick as I could.

Q. Did you run down or walk down? A. I came right fast down the steps.

Q. And did you go down as fast as the plaintiff came down? A. It might be.

Q. You hastened to get to him? A. Yes.

Q. You were in a great hurry to get to him? A. Yes, sir.

Witness further testified that the tail end of the wagon when plaintiff was lying in the street was right beyond the stone. There is this stone and there was the tail end of the wagon, and the horse stood with his head towards 3rd street. The wagon must have changed its position; the horse must have stepped up one step.

Q. You saw the carriage step when you were standing on the steps of the Saengerbund? A. I could not see it—and at the same time I was not standing there. At the same time that I saw him falling over it I was coming down, and I could not see the carriage stone.

Q. You knew what he had fallen over, did you not? A. I knew what he had fallen over?

Q. Yes; did you not know what he had fallen over? A. That he fell over, certainly.

Q. You knew what it was? A. I could not say that he fell over the stone, I could not say what he fell over, I could not tell that. I found out that afterwards.

40 Q. Did you not see the carriage stone that was at the curb there, when he fell did you not see it? A. I could not see it.

Q. Did he cover the whole of it? A. No, but he must have struck the stone with his foot and fell foremost.

Q. Did you not see what he had struck? A. No, not until after while we found out.

Q. When did you find out what it was that he had struck? A. The moment after I came down and I seen him lying right over that carriage stone.

Q. How far was the wheel of the wagon from the carriage step when the plaintiff fell on the street? A. The wheel from the carriage stone?

Q. Yes. A. The end of the wheel was right at the carriage stone, one end of the carriage stone.

Q. And where was he lying? A. Right in the street.
Q. Behind the end of the wagon and behind the wheels of the wagon? A. Yes sir, behind the wheels of the wagon. The end of the wagon was perhaps a foot or two from the step and plaintiff might have fallen about five feet. I am not mistaken in my recollection when I say that when I came out of the Saengerbund the horse remained with his head to Third street.

Thereupon, to further maintain the issue on his part joined, the plaintiff produced as a witness G. A. SEEGAR who testified as follows:
Witness drove the wagon in which the plaintiff was seated from Mr. Borchardine's place.
41 We drove in there; I had my wagon and Mr. Borchardine and Mr. Wolff said that it was Sunday evening and they wanted to make another visit to the Saengermund. We decided when we passed 4½ street to go up there, and we drove up 4½ street to C street and to the Saengerbund hall and went in. We stopped in there a few minutes and came out again. The night was dark and the pavement was dark. There was no light so that you could see much, and as you know, when a person comes out from the light into the dark it is very dark. And Mr. Wolff wanted to get in and when he came to the stone he stumbled and fell over and struck his leg here and fell into the street, and me and Mr. Bordhardine picked him up and put him in the wagon, and from there I drove him to Mr. Koezel's and then I went in my wagon for the doctor, Doctor Kolipinski, and brought him there, and he examined it. Witness, continuing, testified there was no light on the stone and that it was a dark-brown sandstone in color and the pavement was an old brick pavement with many holes in it, and that the stone was about one foot high and about 12 or 15 inches wide and the witness thinks it was about two feet long. Witness states that the plaintiff and Mr. Borchardine sat on the back and on the sides, on one of the long seats in the wagon that was made up of the board and the two boxes, and that it took about two hours to drive in; that the seats were not changed as witness remembers; that the curtains were fastened down so that the party had to get out on the back. Being asked at what point in front of the Saengerbund building the wagon stopped, the witness says: Whether I stopped exactly in front of the Saengerbund I don't know; it may have been a few feet further east. I stopped on the east side of the steps of the Saengerbund hall. I stopped near the steps but maybe it was a foot away or a foot and a half away in the street, I don't know. I know that it was
42 past the stone; maybe it was near the stone; I cannot say. I don't know how long my wagon was. Maybe it was ten feet, a little more or less.
Q. Did your wagon move after you stopped until Mr. Wolff came out? A. I don't know, sir; it may have moved a few inches. You know just how a horse is, sometimes he takes a step ahead or a step back. I did not have to move him to get the wagon into a better position, so that the wagon was in about the same position when

Mr. Wolff and Mr. Borchardine came out as it was when they went in. My wagon was right close up to the curb, not further away than an inch or two, and when I drove up to the Saengerbund I drove into the line of the curb so as to get as near as possible. When plaintiff and Mr. Borchardine got out of the wagon they got out of the back and went across the sidewalk right up the steps.

Q. When you were speaking about that you stopped east of the Saengerbund steps, what do you mean by that? A. Well, I mean my horse faced east.

Q. And how far was your wagon past the Saengerbund steps? A. As I said before, it stood so a person could step out and get up those steps; it was straight in line with those steps.

Q. They were straight in line. What do you mean by that, that they were straight in line where you were sitting? A. Pretty near; I do not know exactly whether it was a few inches further east or not.

Q. You mean the tail end of your wagon was? A. Yes.

Q. You cannot say whether the tail end of your wagon was a few inches east of the steps of the Saengerbund or not? A. Yes, sir.

43 The witness further testified: My wagon, as much as I can recollect, the end of my wagon was near the carriage step, I think part of the hind wheel covered the carriage step, but I cannot recollect any more how much of the carriage step was back of the hind wheel. A foot, and maybe it was fifteen inches of the stone was not covered. I cannot tell. That carriage step was covered a little ways with the hind wheel, but I did not measure the distance, perhaps it was half way or one-third of the way. I don't know how much it was. I found that out later, because I stepped down from the wagon and walked around on the pavement and saw it. Witness saw plaintiff strike the stone and fall over it, and went to his assistance.

Q. How far did he fall? A. I think he fell almost the distance of the wagon.

Q. Did he fall past the wagon? A. I think he did. If the wagon had backed I think it would have run over his back, and both of the wheels would have run over him. When the plaintiff came down the steps I was standing in front of the horse. I suppose I was taking care of my horse, and I stepped out of the wagon to take a walk along the sidewalk. I was near the head of my horse when the plaintiff came down the steps.

Q. While you were walking up and down the sidewalk, did you see this carriage step? A. Yes, sir.

Q. How far were you away from the carriage step while you were walking up and down the sidewalk? A. Different distances; sometimes six feet, sometimes maybe 10 or 15 feet. Witness says that when he was ten or fifteen feet away he could not see the carriage step, nor when he was 6 feet away could he see it.

Q. Then when did you see it? A. When I was near it.

44 Q. What do you mean by near it? A. When I go close to the step.

Q. What do you mean by close to the step? A. To the Saengerbund steps.

Q. What do you mean by being close to the steps—do you mean at the foot of the steps? A. Yes.

Q. When you were at the foot of the steps and would turn around and look, could you see the carriage step? A. Yes, sir.

Q. How far is the foot of those steps from the carriage step? It is the width of the pavement, is it not? A. Pretty near it.

Q. Standing at the foot of these steps, you saw the carriage step? A. I did not stand at the foot of the steps.

Q. Where did you stand? A. I kept walking.

Q. Well, you say you could see that step plainly? A. No, sir.

Q. Did you see it? A. Yes.

Q. Did you use glasses at that time? A. No, sir.

Q. And you could see it without glasses? A. Yes, sir.

Q. And you saw it that night? A. Yes, sir.

Q. Were there any lamps around there? A. Not on that side.

Q. Where was the lamp? A. On the other side, "caticornered."

45 Witness further testified that there was a light inside the Saengerbund but he does not know whether there was one in the vestibule. Witness thinks there was one inside the hall and there was glass in the doors that the light shone through but the light did not stream down the steps.

On redirect examination witness stated that that he had been to Saengerbund before and knew the position of carriage step.

Thereupon, further to maintain the issue upon his part joined, the plaintiff produced as a witness AMELIA BORCHARDINE, who testified as follows:

That she lived at Suitland; that she is familiar with the Saengerbund hall on C street; husband is a member of the Saengerbund Club; was familiar with it in 1895; knows the condition of the lights surrounding the stepping stone in 1895; there is a lamp post on the corner of the alley on the same side of the street as the Saengerbund and one on the other side of the street, but the place where the carriage stone is is very dark and the witness fell over it one time herself.

Cross-examination:

I cannot remember that I was ever in front of the Saengerbund hall on C street in the fall of 1895, particularly, but we almost always came in when there was any entertainment. I cannot answer you as to how many teams I saw there in the fall of 1895, I do not know that any more. I think we went there if there was an entertainment, but I cannot remember whether there was an entertainment in that month. I don't remember whether I was there in November, 1895, or October, 1895, if there was anything going on in August I guess we were there. We came there about eight o'clock and would stay there until about ten and then go home. We would come

in our wagon and bring people along sometimes. We got out in front of the Saengerbund but not on the carriage step; we might get out there on the carriage step sometimes, but I cannot remember
46 any more. We did not always see the carriage stone when we drove up there; we knew it was there, but it was too dark to see it; it was just the color of the pavement. The color of the carriage stone was grey and the pavement is a concrete pavement and looks like the asphalt looks. I don't think it was a smooth concrete sidewalk, at the time we are talking about, I think it was a brick pavement. When I said a grey pavement I meant the street, not the sidewalk, and the color of the carriage step was grey. I have not taken so much notice of the carriage step that I can tell you whether it was lighter or darker than the street. I think the street in that square is dark all the time, and that it is a very dark street. Yes, there are lamps located there. There is a light across the street, but it was no light over there very much. I think that light across the street is more towards 3rd street than it is towards 4½ street, and it is not immediately opposite the Saengerbund place. There is another lamp on the corner of that alley some three or four houses from the Saengerbund place not further away than the length of this room. The lamp across the street was as far away from the carriage step as one-half as long as that room is from the carriage step across the street, but I cannot swear that the lamp across the street was about the length of this room from the carriage step. I never took much notice of the lamps around there. I never thought I would have to say anything about it. I never observed it, nor had occasion to notice the lights in front of the Saengerbund before this came in. There was always a light in the hall in 1895. I don't think there was a light in the vestibule, I think the light was inside the hall. I am not positive there was not a lamp hanging in the vestibule of the Saengerbund before you entered the hall. I won't say anything on that question
47 because I don't know, I cannot say there was and cannot say there was not. I don't know whether there was a light in October, 1895, or not. I never made any experiment with the lamps on C street to see how far they would cast a shadow and cannot tell you how far the shadow of the leaves of the trees was cast from that light on C street, nor how far the shadow of the tree just towards 4½ street was cast by the lamp or the light from the Saengerbund hall. I cannot tell you how far the shadow of the carriage was cast on the sidewalk from the lamp on the north side of C street for I never took so much notice of it, nor can I tell you how far the shadow of the carriage step was cast out into the roadway from the light in the Saengerbund hall. I am not much of an expert of light at that point.

Thereupon the plaintiff, having given evidence of the extent of his injury by Dr. Kolipinski, rested.

Whereupon the defendant, to maintain the issue on its part joined, produced the following testimony: GEORGE C. BURNS, who testified

that he was general inspector, computor and draftsman in the District engineer department, and of the correctness of the plat and the distance and measurements shown therein referring to that portion of C street including Saengerbund hall and vicinity, which said plat as well as the photographs, before and hereinafter referred to, are to be used in any appellate court the same as if fully set out herein.

Thereupon the defendant, to further maintain the issue on its part joined, produced EDWARD V. MURPHY, who testified that his brother, Daniel Murphy, purchased premises No. 314 C St., N. W. and moved in the same in the fall of 1875, and there resided until about 1894 or possibly 1895, and that the said Daniel Murphy has been dead since 1896; that the carriage step mentioned was in front of
48 the premises and has been in front of the premises ever since witness can remember and long before his brother took possession of that house; and that it is witness' impression that it was put there when the house was built, and that the stone remained there down to the time of the death of Daniel Murphy; that it was a brownstone step something like two feet long, possibly one foot wide or a little more than that. That the stone in front of the adjoining premises and the stone that was spoken of are precisely the same.

Thereupon the defendant, to further maintain the issue on its part joined, recalled the said GEORGE C. BURNS, who testified that the dimensions of the carriage step in front of No. 312 C street are 29¾ inches long, 13¾ inches wide and with a rise from the sidewalk of 7¼ inches.

And thereupon said witness further testified that a straight line from the middle of the lamp post at the alley would run outside of the line of the trees on C street in front of Nos. 314 and 312 and that it would miss the trees.

And, thereupon, two photographs, taken by witness during the process of the trial showing the lamp post represented on the plat mentioned and being on the opposite side of the street, were exhibited to the witness who stated that he took said photographs from the base of the Saengerbund steps about on a level, about five feet above the surface; that the boughs of the trees shown in the photographs do not come out in the street; that none of the boughs of the trees are lower than the lamp, but that witness does not know how often the trees are trimmed; that the curb of the roadway on the Saengerbund side of C street is six inches higher than the roadway and it has been there over eight years having been placed there before witness was employed by the District; that there is now a little tree in front of the Saengerbund, but witness does not
49 know whether there was a tree at that place in 1895; that there is a tree 13 inches in diameter west of the Saengerbund hall, distant from the center of the steps about 12 feet. Witness further testified that the boughs of the trees on the north side of C street diagonally over from the Saengerbund hall are higher than

the lamp and that the young tree, mentioned by him, is about 2 inches to 1½ inches in diameter.

And, thereupon, the defendant, to further maintain the issue on its part joined, called TRUMAN KANHAN, who testified that he was superintendent of parking and trees in the District of Columbia and had been so employed very nearly 18 years; that the trees on C street in the neighborhood of the Saengerbund are silver or soft maple trees; that the tree directly opposite the Saengerbund is apparently between twenty and twenty-five years old and was planted before witness came in parking commission; that the trees on C street, and particularly on that square, have been kept trimmed up high all the time; and that there is no indication on that particular tree that any limb had been cut off near the bottom at any time from the side next to the street or on the side next to the lamp; that there is no indication of such taking, and if they had been taken off within the last six or eight years, witness thinks there would have been indications if the limbs had been of any size; that the tree in front of the Saengerbund building the small tree, was planted last spring, a year ago, probably not until last spring; that witness knows it has not been planted there two years, and that when it was planted there, there was no tree at that place; that the leaves of a silver maple tree in the city of Washington fall about the 15th of October, and when they begin to come down they come down pretty rapidly until they are bare of leaves.

Cross-examination:

In a very wet season these leaves might stay on a little
50 longer, and in a remarkably moist and warm season they remain a little longer than in a cold dry season; that very few of the silver maple trees retain their leaves up in November; that such trees do not have very dense foliage and the leaves are not very dark; and that the limbs of said trees, as a rule, grow obliquely from the trunk; that the limbs run straight out and perhaps some of them probably droop with the rain on them, but witness did not observe that it was so at the place spoken of; that the limbs of the particular tree across from the Saengerbund run up and are not drooping and that nothing could bring them down to a point below the lamp that is now there, without breaking them; that witness saw these trees yesterday and there is not a limb that you could bring down below the level of the lamp, and that the trees on that street have not been trimmed in the last two years, but witness cannot say whether they were trimmed in 1895 or not.

And thereupon the defendant, further to maintain the issue on its part joined, called ADOLPH LEVY, who testified that he was a member of the house committee of the Washington Saengerbund and that the Saengerbund took possession of the present premises in the spring or fall of 1893; that there has been no change in the steps

of the Saengerbund since then; and that the carriage step mentioned was there when the Saengerbund took possession of the premises, and the said carriage step remained there until about two years ago, when a new cement walk was laid, and says, we gave it away and had it removed; that the carriage step in front of 312 C street is identically the same as the one that was removed; that there was no tree in front of the Saengerbund in the month of October, 1895; that the hallway of the Saengerbund is lighted at night by a large lantern in the vestibule and a gas light on the entrance and on the stairway upstairs there are two large lights; that the light in the hallway is at the foot of the stairway that leads upstairs, on the newel
51 post; that the lantern in the vestibule has been there ever since the Saengerbund has used the premises as a club-house; that the lamp in the vestibule and other lamps are at all times lit at night; and that when that light is lit in the vestibule it lights up the steps and pavement in front of the club-house as bright as a bright moonlight night; that when the light in the lamp diagonally opposite on the street is lit, it makes the light on the pavement in front of the club-house and the stone very bright; that the light on the corner of the alley west of the club-house lights up the pavement for a house or two, that the light in the vestibule lights up to the full extent of the sidewalk and you must see the carriage step if you are walking down the steps; and that a person ordinarily coming down those steps can see that carriage step. Witness did not testify as to condition of light the night of the accident and cannot say whether or not you could see the carriage step if the light was out.

And thereupon the defendant further to maintain the issue on its part joined, called FRANK CLAUDY, who testified as follows:

That he is the president of the Saengerbund and has been continually its president since 1895; and that there has been no change since 1893 in the arrangement in front of that building including the steps coming down to the pavement. Witness further testified that the carriage step mentioned was in front of the premises in 1893, and that it was removed in 1900, when the sidewalk was relaid; that the vestibule of the club-house is lighted by a very large lamp with a very bright light, large burner; that back of that lantern is a door with the sides also of glass, glass panels; that back of this glass door, about nine or ten feet, there is a stairway that goes to the upper story, on the newel post of which there is a bronze figure on which are three globes, and that those three
52 g-obes are lit regularly by gas light; that Sunday night is the night in the week in which the club-house is the most patronized by its members and such was the practise in October, 1895; and that ever since the time the club-house was purchased the Saengerbund has pursued one custom regularly, every Sunday evening to light up everything that is "li-table," to coin a word; that when the hall and vestibule lights are lighted, these two lights combine, or rather the three lights, two in the hall and one in the vestibule, and throw a very bright light on the steps and sidewalk

so bright that I have tried, for fun, to throw a five-cent piece on the sidewalk and I have then looked out and seen it and then gone down on the street and picked it up—saw the five-cent piece from up above; that the light across the street adds to the brightness of the sidewalk; that when all the lights are lit it is absolutely impossible not to see that stone when you are on the top of the steps or coming down. It is as bright as bright can be. That in the years 1893, 1894 and 1895 there were no trees immediately in front of the club-house, but there is now a very young tree which has been planted since the sidewalk was relaid; and that there has been no change in the position of the two lamp posts, one at the corner of the alley and the one across the street, and that the only change that has been made there is that of a new pavement and the carriage step has been taken away and a new tree planted there; that there were no accidents reported in reference to this carriage step until witness heard about this accident a month or so ago. Witness had never been at house when vestibule light was out and only hall light was burning and gave no testimony as to condition of lights night of accident.

And thereupon the defendant, further to maintain the issue on its part joined, produced JOHN WALDMAN, vice-president of the
53 Washington Saengerbund who testified in substance to the same effect as the previous witness, Frank Claudy and GEORGE SMITH, the caterer of the Saengerbund since the 6th day of May, 1897, who testified to the same effect, and JAMES SPRINGHAM, who testified that he has been doorkeeper of the Saengerbund since 1897 and has always been there on Sundays and that the carriage stone was there when he first went there, and described how the premises were lighted substantially as testified to by the previous witnesses; and GEORGE H. KOLB, who testified he was employed at the Saengerbund in 1897, and that the light from the vestibule and hall of the building lit up the steps and the pavement down to the carriage stone, and that any person coming down the steps when these lights were lit could see the carriage step; but none of them testified as to condition of lights the night of the accident.

Thereupon the plaintiff, in order to maintain the issues on his part joined, produced as a witness JOHN B. MOON, who testified as follows:

That he lived at 306 C street, N. W., Washington, D. C. and has lived there since 1895; at one time was a member of the Saengerbund Association; branches on the trees across from the Saengerbund hall had been lopped off; one of the limbs extends half way across the street, pointing towards the Saengerbund; the end of this limb which would point downward has been cut off; the whole east side of the tree west of the lamp post has been trimmed up; the tree on the same side of the Saengerbund and west of the Saengerbund has had branches cut off near the top; the trees on the opposite side of the street and pointing toward the Saengerbund hall extend more than half way across the street; remembers the wind storm;

it occurred after he moved on C street; after the storm, could hardly get along C street on account of the branches that were in the street.

54 On cross-examination, witness testified that he was raised on a farm and was familiar with trees; left the farm when about twelve or thirteen years of age, didn't know that there were lace curtains on the panels of the door; knows that you could not see through the door; might have been stained glass; does not know whether it was stained glass or lace curtain; when you rang the bell could not tell whether anybody was coming or not to open the door; could not distinguish the figure or the face of the person through the door; could not tell whether it was light or dark on the inside; examined the trees on two occasions; there is a tree directly opposite the Saengerbund and a little east of a line directly north of the entrance of the Saengerbund.

This is the substance of all the testimony.

Whereupon the defendant moved the court to instruct the jury to render a verdict for the defendant upon the ground that the plaintiff had not made out a case, and over objection of plaintiff the court granted said motion, to which ruling of the court the plaintiff then and there duly excepted, and the jury returned a verdict for the defendant in accordance with the court's said direction.

All of which exceptions, as stated in the foregoing bill of exceptions, were duly noted by the court on its minutes at the time the said were severally taken, and the said several exceptions are signed as the several exceptions taken at the trial of the above-named case this 30th day of June, 1902, *nunc pro tunc*.

E. F. BINGHAM, [SEAL.]
Chief Justice.

55 *Memorandum.*

June 30, 1902.—Time to file transcript further extended to July 31, 1902.

Order for Record.

Filed July 14, 1902.

In the Supreme Court of the District of Columbia, the 14 Day of July, 1902.

WOLFF *vs.* D.C. } At Law. No. 41533.

The clerk of said court will please make up record in above cause as follows:

1. Original declaration and last amended declaration, filed August 20, 1901, as amended January 13, 1902; and pleadings thereon and judgment of court.

2. Appeal to Court of Appeals & several proceedings thereon.
3. Bill of exceptions (original).

JOHN C. GITTINGS,
D. W. BAKER,
Attorneys for Plaintiff, Appellant.

I consent:

E. H. THOMAS,
Attorney for D. C.

56 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, *District of Columbia,* } ss:

I, John R. Young, clerk of the supreme court of the District of Columbia, hereby certify the foregoing pages, numbered from 1 to 55, inclusive, to be a true and correct transcript of the record, as per directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 41,533, at law, wherein Abraham Wolff is plaintiff and The District of Columbia is defendant, as the same remains upon the files and of record in said court.

Seal Supreme Court of the District of Columbia.

In testimony whereof, I hereunto subscribe my name and affix the seal of said court, at the city of Washington, in said District, this 25 day of July, A. D. 1902.

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia supreme court. No. 1238. Abraham Wolff, appellant, *vs.* The District of Columbia. Court of Appeals, District of Columbia. Filed Jul- 28, 1902. Robert Willett, clerk.

WEDNESDAY, *March 4th, A. D.* 1903.

ABRAHAM WOLFF, Appellant,
vs.
THE DISTRICT OF COLUMBIA. } No. 1238.

The argument in the above entitled cause was commenced by Mr. John C. Gittings attorney for the appellant, and was continued by Mr. E. H. Thomas, attorney for the appellee.

THURSDAY, *March 5th, A. D.* 1903.

ABRAHAM WOLFF, Appellant,
vs.
THE DISTRICT OF COLUMBIA. } No. 1238.

The argument in the above entitled cause was continued by Messrs. E. H. Thomas and A. B. Duvall attorneys for the appellee, and was concluded by Mr. D. W. Baker, attorney for the appellant.

ABRAHAM WOLFF, Appellant,
vs.
THE DISTRICT OF COLUMBIA. } No. 1238.

Opinion.

Mr. Chief Justice ALVEY delivered the opinion of the court:

This is an appeal from the supreme court of the District of Columbia. The action was brought by the appellant against the District of Columbia to recover damages suffered by the plaintiff, occasioned, as alleged, by what is contended to be a nuisance or an unlawful obstruction allowed to exist in C street N. W., in the city of Washington, by the defendant, the municipal corporation of the District of Columbia.

The cause of action, as set forth in the amended declaration of the plaintiff, is stated to be that the defendant, as a municipal corporation, was in duty bound to keep the sidewalks of the streets in the city of Washington free from obstructions, nuisances, or incumbrances, so as to be safe for all travelers thereon, including the plaintiff; and the breach of duty of the defendant, as alleged in the declaration, was, that the defendant wrongfully and negligently allowed "a certain large stone, several inches high above the surface of the sidewalk, usually termed a carriage step, to impede travel and incumber that part of said sidewalk which was opposite to and in front of a certain house known as the Saengerbund hall, between Third and Four-and-a-half streets on C street northwest," during the night of the 27th day of October, 1895, while said street was enveloped in darkness, without fixing any light or sign at or near said

stone, and without placing any watchman or other person to warn plaintiff of its existence, position, and location, and without placing any guard or screen around said stone, by means of which the plaintiff stumbled and tripped against and fell over said stone and was injured, without any neglect on his part, and he claims $25,000 damages.

The defendant pleaded the general issue plea of not guilty, and the case was tried and resulted in a verdict and judgment for the defendant.

There was considerable proof taken at the trial, both as to the occurrence of the accident and as reflecting upon the question of contributory negligence of the plaintiff, assuming that it might be shown that there was negligence on the part of defendant. But in the view that we take of this case, the question of contributory negligence on the part of the plaintiff, in producing the injury complained of, is not an element in the case, and therefore is not a matter for consideration. The carriage block or step over which the plaintiff fell and injured himself is shown to have been of the ordinary size and character, a block of brown stone a little more than two feet long, about fifteen inches wide, and about eight inches high from the surface of the pavement, and occupied a position in or at the curb dividing the street from the sidewalk, immediately in front of the door of the Saengerbund building, No. 312 C street, N. W., on the south side thereof; and that this block of stone or carriage step had been there from the time the building was erected, many years prior to the time of the accident, and without question by anyone. It was similar in size and character to the one set in the curb in front of the adjoining building, No. 314, and which had been used for many years, according to the testimony in the case. The plaintiff, in coming out of the Saengerbund building, by a quick and rapid gait, and intending to go to the vehicle awaiting him in the street in front of the door of the Saengerbund, stumbled over the carriage block at the curb, and was thrown down, and fractured his leg. He swears that he did not see the carriage block in his way, and that there was not sufficient light to enable him to detect his danger.

At the close of the evidence the court below, being of opinion that there was no case made out for the plaintiff, instructed the jury to render their verdict for the defendant, which was accordingly done, and the plaintiff excepted; and from the judgment the plaintiff has appealed.

The error assigned is, that the court below committed error in directing the verdict for the defendant.

It is contended by the plaintiff that the carriage block in question was an unlawful obstruction of the sidewalk, and consequently a public nuisance, and that being so, it was the plain duty of the municipal authorities of the District to see that all sidewalks were kept free from obstruction of every kind and description; and sections 222, 225, 226, 227, and 229 of the Revised Statutes relating to the

District of Columbia are cited and relied on in support of the proposition.

By section 226, Rev. Stats. D. C., it is provided that "it shall be the duty of the Chief of Engineers, in charge of the public buildings and grounds, to cause obstructions of every kind to be removed from streets, avenues, and sidewalks in the city of Washington, as have been or may be improved in whole or in part by the United States, and keep the same, at all times, free from obstruction." And by section 229 it is provided that "if any person shall place any obstruction on the streets, avenues, or sidewalks so improved by the *United States, such person shall pay the cost of removing the same*, and shall be subject to a penalty of ten dollars, to be recovered as other debts are recovered in said District, for each and every day the obstruction may remain after the Chief of Engineers shall have given notice for its removal."

Without stopping to inquire what duty these sections of the Revised Statutes imposed, if any, upon the Commissioners of the District, the question here presented is, whether an ordinary carriage block or step, such as we have in this case, and such as has been in use from time immemorial, as an incident or appurtenant of convenience, if not of necessity, to places of business and residences in cities, constitutes an obstruction within the meaning of the sections of the statute quoted. It is clear, the provisions of the statute do not apply to many things that may, in a sense, be regarded as obstructions to the sidewalks of a street. They certainly do not apply to the shade trees growing along the sidewalks, nor to lamp posts, water hydrants, awning posts, telegraph or telephone poles, that we find everywhere, in the city, along the sidewalks. All these things may be regarded, in a particular sense, as obstructions, but they are not such within the meaning of the statute. They are objects allowed and authorized, by immemorial custom and usage, as being necessary to the health, convenience, protection, and enjoyment of the homes and lives of the inhabitants of the city. Where these objects of convenience and comfort have been subject to proper regulation, as they always are and should be, they have never been regarded as nuisances, either public or private. And in the case of a carriage step or block, it is of such reasonable convenience and necessary appurtenant to dwellings and places of business on the streets of a city that the right to maintain it, of a proper size and in a proper position, has seldom been attempted to be questioned. The legal existence of carriage steps or blocks was fully recognized in this city long before the occurrence of the accident, the subject of the present action, and have been regulated by both the building and police regulations prescribed by municipal authority. Their legal existence has been explicitly recognized by this court in the case of Howes *v.* District of Columbia, 2 App. D. C. 188, 22 Wash. Law Rep. 41, and that is in accordance with decisions of the highest authority elsewhere.

In the case of Du Bois *v.* City of Kingston, 102 N. Y. 219, it was

the unanimous opinion of the court of appeals of New York, that a stepping stone in the front of a public building, just inside the curb of the sidewalk, was not such an obstruction as would render a city liable for an injury sustained by a person falling over it, even though others had previously been injured by falling over the step. It appeared that the plaintiff was injured while running to a fire, which appeared to be in the direction of his own house, in the city of Kingston, by falling over a stepping stone, lying in the sidewalk in one of the streets of the city. The stone was 3 feet 4 inches in length, 20 inches wide, and 14 inches high. It lay lengthwise with the curb and on the side thereof, in front of the building containing the postoffice, a music hall, and several stores. In the opinion, the court said: "Actions against municipal corporations for injuries sustained by individuals while using or passing along its streets are founded upon the ground of negligence of its officers in performance of their official duties, and can not be maintained without evidence showing that they have been derelict in this respect, by means of which the injury has been sustained. We think there was no such proof upon the trial of this action. The stepping stone over which the plaintiff fell and was injured was not of unusual size or of an improper construction, nor was it located at an improper place. It was placed in a position on the sidewalk most convenient for persons who should alight from a wagon or carriage or get into the same from the sidewalk, and thus it was a means of accommodation to those who had business at the postoffice, or in the building in front of which it was located. It was not any more exposed than was essential for its proper and useful location." And in the conclusion of the opinion it was said: "It would be extending the rule of the liability of municipal corporations far greater than has yet been done in any decided case, to hold that they are liable for assenting to the placing of stepping stones on the edge of sidewalks in front of hotels, stores, public buildings, and private residences. The courts have gone quite far in holding such corporations to a very strict responsibility in reference to accidents caused by a failure of their officers to keep the streets and sidewalks in a proper and safe condition, but it would be adding to the corporate liability beyond reasonable limits to hold that stepping stones, which are almost a necessity in providing for the interest, comfort, and convenience of the public in the maintenance of walks, avenues, and streets, constitute a nuisance or obstruction, and that municipal corporations are liable for damages by reason of accidents caused thereby."

In the more recent case of Roberts *v.* Powell, 168 N. Y. 414, the same principle is very fully laid down. In this latter case the action was brought against the owner of the dwelling in front of which the carriage block was placed. It was held by the unanimous opinion of the court, that the block being of an ordinary size, and placed in the usual position at the curb, was not an unlawful obstruction of the sidewalk, and the plaintiff could not recover for injuries received

by stumbling over the step. In that case, on the night of the accident, the plaintiff, while walking rapidly on Fifty-eighth street, crossed the street diagonally from the defendant's house, in order to take a cab, and stumbled over a stepping stone or carriage block maintained by the defendant in front of her residence. The stone over which the plaintiff fell was 18 inches high, 13 inches long, and 16 inches wide. In the opinion the court said:

"The stepping stone in this case, located upon the sidewalk in front of a private house, was a reasonable and necessary use of the street, not only for the convenience of the owner of the house, but for other persons who desired to visit or enter the house for business or other lawful purpose. It did not interfere in the least with the use of the roadway or bed of the street; nor did it interfere to any appreciable or unreasonable extent with the use of the sidewalk. There were eight feet of a clear, open space upon the sidewalk for the use of travelers, and the fact that the plaintiff, while hurrying in the night time to take a cab, stumbled over the stone, when the place was well lighted and the object plainly visible, does not prove, or tend to prove, that the defendant was guilty of any wrong or breach of duty in maintaining the stepping stone in front of her house. It is true that the plaintiff was injured, but that was the result of an accident, due possibly to his own fault, but at all events not to any fault on the part of the defendant, or to any unlawful obstruction by the defendant of the street. The question involved in the case is, we think, well settled by authority. Dubois *v.* Kingston, 102 N. Y. 215; Dougherty *v.* Trustees, etc., 159 N. Y. 154. While it is said that these cases involved only the question of liability on the part of a municipality for negligence, they also decided that the existence of objects of this character in the streets is lawful. If the city could — be held liable for permitting them to be there after notice, neither can the defendant be held liable for placing them there. The question involved in this class of cases is whether the object complained of is usual, reasonable, or necessary in the use of the street by the owner of the premises, or any one else."

There are other courts than those of New York that have maintained the same principle. City of Cincinnati *v.* Fleischer, 63 Ohio St. 229; Macomber *v.* City of Taunton, 100 Mass. 255; Cushing *v.* Boston, 124 Mass. 434; Horner *v.* City of Philadelphia, 194 Pa. St. 542.

Upon general principle as well as upon authority we are clearly of opinion the carriage block or stepping stone in question was not an unlawful obstruction of the street or sidewalk, and that the defendant is not liable for the injury received by the plaintiff in stumbling and falling over the stone.

But the plaintiff contends that even conceding that the carriage block in question was not an unlawful obstruction, and did not constitute a public nuisance, yet the street in that particular section was defectively and insufficiently lighted, and because of such defective and insufficient lighting of the street and sidewalk, the

plaintiff ran against and stumbled over the block or stepping stone and was injured, and that the defendant corporation is liable for such injury, because of the neglect to properly light and keep lighted the street and sidewalk where the accident occurred. But whatever insufficiency may have existed in the light upon the occasion of the accident, (if any insufficiency did in fact exist), such an action as the present is not the remedy for the consequences of such defect. Money is annually appropriated by Congress for lighting the streets of the city; but whether such appropriation be sufficient or insufficient, the courts cannot determine; nor can they determine how the lights shall be distributed through the city; or how any particular street or section of a street shall be lighted, whether by few or many lights or whether by gas or electricity. These are matters that are confided exclusively to the judgment and discretion of the municipal authorities.

Finding no error in the ruling of the court below directing the verdict for the defendant, we must affirm the judgment, and it is so ordered.

Judgment affirmed.

TUESDAY, *April 7th, A. D.* 1903.

ABRAHAM WOLFF, Appellant,
vs.
THE DISTRICT OF COLUMBIA. } No. 1238, April Term, 1903.

Appeal from the supreme court of the District of Columbia.

This cause came on to be heard on the transcript of the record from the supreme court of the District of Columbia, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said supreme court, in this cause be, and the same is hereby, affirmed with costs.

Per MR. CHIEF JUSTICE ALVEY.

April 7, 1903.

TUESDAY, *June 2d, A. D.* 1903.

ABRAHAM WOLFF, Appellant,
vs.
THE DISTRICT OF COLUMBIA. } No. 1238

On motion of Mr. D. W. Baker of counsel for the appellant, it is ordered by the court that a writ of error to remove this cause te the Supreme Court of the United States issue, and the bond for costs is fixed at the sum of two hundred dollars.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the justices of the Court of Appeals of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Appeals before you, or some of you, between Abraham Wolff, appellant, and The District of Columbia, appellee, a manifest error hath happened, to the great damage of the said appellant as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 2d day of June, in the year of our Lord one thousand nine hundred and three.

Seal Court of Appeals, District of Columbia.

ROBERT WILLETT,
Clerk of the Court of Appeals of the District of Columbia.

Allowed by

——— ———.

(*Bond on Writ of Error.*)

Know all men by these presents, that we, Abraham Wolff as principal, and A. L. Saltzstein, as surety, are held and firmly bound unto The District of Columbia in the full and just sum of two hundred dollars to be paid to the said District of Columbia — certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this fourth day of June, in the year of our Lord one thousand nine hundred and three.

Whereas, lately at a Court of Appeals of the District of Columbia, in a suit depending in said court between Abraham Wolff, appellant, *vs.* The District of Columbia, appellee, a judgment was rendered against the said Abraham Wolff and the said Abraham Wolff having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said District of Columbia citing and

admonishing it to be and appear at a Supreme Court of the United States, to be holden at Washington, within thirty days from the date thereof:

Now, the condition of the above obligation is such, that if the said Abraham Wolff shall prosecute said writ of error to effect, and answer all costs if he fail to make — plea good, then the above obligation to be void; else to remain in full force and virtue.

ABRAHAM WOLFF, [SEAL.]
By D. W. BAKER,
Att'y in Fact. [SEAL.]
A. L. SALTZSTEIN. [SEAL.]

Sealed and delivered in the presence of—
—— ——.

Approved by—
R. H. ALVEY,
Chief Justice Court of Appeals of the District of Columbia.

O. K.
A. B. D.

[Endorsed:] No. 1238. Abraham Wolff, appellant, *vs.* The District of Columbia. Bond on writ of error to Supreme Court U. S. Court of Appeals District of Columbia Filed June 4, 1903 Robert Willett clerk.

UNITED STATES OF AMERICA, *ss:*

To the District of Columbia, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the clerk's office of the Court of Appeals of the District of Columbia, wherein Abraham Wolff is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable R. H. Alvey, Chief Justice of the Court of Appeals of the District of Columbia, this 4th day of June, in the year of our Lord one thousand nine hundred and three.

R. H. ALVEY,
Chief Justice of the Court of Appeals of the District of Columbia.

Service accepted
A. B. DUVALL, *Att'y D. C.*

June 6 / 03.

[Endorsed:] Court of Appeals, District of Columbia. Filed Jun 8, 1903. Robert Willett, clerk.

Court of Appeals of the District of Columbia.

I, Robert Willett, clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages, numbered from 1 to — inclusive contain a true copy of the transcript of record and proceedings of said Court of Appeals in the case of Abraham Wolff, appellant *vs.* The District of Columbia, No. 1238, April term, 1903, as the same remain upon the files and records of said Court of Appeals.

Seal Court of Appeals, District of Columbia.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the city of Washington, this 10th day of June, A. D. 1903.

ROBERT WILLETT,
Clerk of the Court of Appeals of the District of Columbia.

Endorsed on cover: File No. 18,979. District of Columbia Court of Appeals. Term No. 62. Abraham Wolf, plaintiff in error, *vs.* The District of Columbia. Filed June 20, 1903. File No. 18,979.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 62.

ABRAHAM WOLFF, PLAINTIFF IN ERROR,

vs.

THE DISTRICT OF COLUMBIA, DEFENDANT IN ERROR.

BRIEF ON BEHALF OF PLAINTIFF IN ERROR.

This is a writ of error to the Court of Appeals of the District of Columbia to review the judgment of that court affirming the judgment of the supreme court of the District of Columbia, rendered in favor of the defendant in error February 28, 1902 (Rec., p. 6).

STATEMENT OF FACTS.

This is an action of trespass on the case brought by the plaintiff in error against the District of Columbia. Plaintiff's declaration alleges that on the night of the 27th of October, 1895, while going from a house, No. 314 C street, in the city of Washington, District of Columbia, to a carriage in front of said house he proceeded to cross the sidewalk, when he stumbled over a large stone block, which afterwards turned out to be a carriage step; that the step was close to the curb, and fractured his right leg above the knee; the leg was so badly injured it became necessary to ampu-

tate same above the knee; that plaintiff had no knowledge of the existence of said carriage step, and the streets were not lighted sufficiently to see same; that the injury was occasioned through no negligence on his part. Besides the loss of his leg, his health was greatly impaired, and he claimed damages in the sum of twenty-five thousand dollars.

The defendant filed a plea of not guilty, on which issue was joined.

When the case came on for trial the plaintiff proved the following facts: That on the 27th of October, 1895, he was twenty-eight years of age and employed by a Mr. Kozel, on Fourteenth street between T and U streets northwest; that the 27th of October was a Sunday, and plaintiff, in company with his brother, William Wolff, and his sister-in-law and his brother's two children, about eleven o'clock a. m., drove to the country to pay a visit to a Mr. Borchardine, whose place was located in Prince George's county, Maryland, about five miles from the city of Washington. They drove there in a wagon owned by a Mr. Seegar, remaining there all day. About dusk plaintiff returned to the city in company with his brother and sister-in-law and their two children, Mr. Borchardine, and Mr. Seegar, in Mr. Seegar's wagon. After reaching the city they drove to the Saengerbund hall at the invitation of Mr. Borchardine. Mr. Seegar drove them up Four-and-a-half street to C and down C to No. 314, where the Saengerbund club is located. The wagon stopped, and plaintiff and Mr. Borchardine got out and went into the club-house, where they remained for about five minutes, plaintiff indulging in a glass of beer and a cigar. This was between eight and nine o'clock. Coming out of the club, plaintiff preceded Mr. Borchardine and came down the steps, the wagon being drawn up close to the curb in front of the premises 314 C street. While crossing the sidewalk to get into the wagon plaintiff stumbled over a large stone, which afterwards developed to be a carriage block, made of brownstone, about three feet

long, fifteen or sixteen inches wide, and about a foot high; plaintiff further stated that the stone was set on an old red brick pavement; that he was looking where he was going at the time, but was not looking down at the pavement, but was looking straight ahead of him; that he did not see the stone, nor had he any knowledge of a stone being there; that he had never been in that locality of C street between Third and Four-and-a-half streets except once before, and on that occasion he walked from Four-and-a-half street to the Saengerbund hall; no one had ever informed him of the existence of such an obstruction on the sidewalk; there were not sufficient lights to show the existence of the stone; there was a lamp-post on the opposite side of the street, but it did not cast any light on this stone; there was no light in the vestibule of 312 C street on the night of the accident; there was a lamp-post on the same side of the street, on the corner of the alley, but there were two or three trees between the lamp-post and the carriage stone; that the street was dark, although it was a bright, starlight night; that all the trees were of good size and still retained the leaves at the time of the accident; that he believed the wagon had changed its position while he was in Saengerbund hall, but of this he was not certain, but in getting out of the wagon to go into Saengerbund hall he did not observe a stone; does not recall definitely how he got out of the wagon, whether out of the side or out of the rear; thinks he got out by putting his foot on the rear wheel of the wagon; does not believe the stone could have been seen from the steps of Saengerbund hall; that the carriage stone he fell over was to the rear of the wagon; that his intention in crossing the sidewalk was to go around the wagon and get in from the opposite side, so that Mr. Borchardine would not be detained in getting in; plaintiff knows that there were leaves on the trees.

On cross-examination the plaintiff was asked the following questions:

"Q. If you had looked, when you got out of the wagon to go into the Saengerbund, you could have seen that carriage step, could you not?

"A. I don't know; I never looked. I never looked down into the street; I looked ahead. I always do look ahead when I walk.

"Q. If you had looked when you came down from the steps you could have seen the carriage step, could you not?

"A. Certainly, I saw the wagon; I could see the wagon, it was high.

"Mr. DUVALL: That is not my question."

Thereupon the stenographer read the question, and the witness answered:

"A. Not if I looked ahead of myself; not if I looked straight out.

"Q. Were you intending to fly or to walk?

"A. No, sir, it was dark; I could not see that step.

"Q. If you had looked in the direction in which you intended to walk, could you not have seen the carriage step?

"A. I don't think I could.

"Q. Why not?

"A. Because it was dark; certainly, if I were standing on the sidewalk and looked, I think I could have seen it if I had looked down.

"Q. Exactly. When you reached the sidewalk after you had left the steps?

"A. Yes, sir.

"Q. If you had looked in the direction in which you were going, could you have seen the carriage step?

"A. No, sir; I did look in the direction in which I was going, but I was looking straight out before me.

"Q. What were you looking at?

"A. I was looking where I was walking.

"Q. What, were you looking?

"A. I was looking right straight ahead, not with my head down.

"Q. At what object?

"A. Not at any particular object at all.

"Q. You made no observation at all of the point at all where you put your foot, knowing that you had to go to the curb and to go to the gutter, but you did not look at all, is that it?

"A. Certainly, I looked. I could not see any stone there, though."

Mrs. Francis Wolff, a sister-in-law, corroborated all the statements of plaintiff, and testified that she was seated in the rear seat in the wagon, the wagon being an ordinary grocery wagon with a seat across the front; that Mr. Seegar sat on the main seat, and she, with the others, sat on the sides of the wagon; the seats were arranged by boards on boxes running lengthwise with the wagon, and she was seated on the rear seat facing Saengerbund hall after the wagon stopped; that the plaintiff and Mr. Borschardine went into the Saengerbund hall; she and the others remained in the wagon; that they remained inside of the hall probably ten minutes; the plaintiff came down the steps, and, while walking to get into the wagon, fell over the stone; that where she was sitting she could see up the steps of Saengerbund hall; that the wagon stood parallel with the sidewalk, the rear probably a couple of feet east from the line of the steps of Saengerbund hall, and that she could look up the steps from her side; that she did not see the carriage stone until after the plaintiff had fallen over it; there was no light cast upon the stone, and the only lights in Saengerbund hall were from the window; there was no light in the vestibule of the hall. Plaintiff came down the steps like any one else would; seemed to be walking towards the street to get in the wagon when he fell over the stone; after the plaintiff fell she could see more plainly what he had fallen over; the light across the street was between the trees, because, from the reflection of the light, she could see the leaves in the middle of the street. The stone that plain-

tiff fell over was about two feet from the rear of the wagon, on the sidewalk; wagon probably moved a little towards Third street after the plaintiff had gotten out and before he returned; witness could see the plaintiff when he lay in the street, but not very well. When she looked out of the wagon at the stone she was about two feet from it.

Otto Borchardine, another witness on behalf of plaintiff, testified that he was a member of the Saengerbund; that he had invited Mr. Wolff to take a glass of beer and a cigar; that they were in the Saengerbund about five minutes; when coming out plaintiff went down the steps first because he, Borchardine, had to close the door after him; he thinks he was on the platform of the steps, 314 C street, when he saw the plaintiff trip over something; that the street was very dark; there was no light shining on the stone; the stone was a brown stone and placed on an old brick pavement; the stone, to witness' knowledge, had been there since 1889; that there were some trees right near it; there was a light on the alley, on the same side of the street, three or four doors below the Saengerbund hall, and trees in between the light and the stone; there was a light on the opposite side of the street catercornered from 314 C street; neither of these lights shone on the stone; he did not take any notice of the stone that night, but he knew that there was a stone there, as he had seen it many times before. The wagon must have moved towards Third street a little after witness and plaintiff had gotten out and gone into the Saengerbund, but witness thinks the stone was between the two wheels when he got out; that if any one had stepped on the hind wheel in getting out of the wagon they would not have stepped on the stone; he further said that he could not see the carriage step when he was standing on the steps of the Saengerbund; witness was asked if he knew, while he was on the Saengerbund steps, what the plaintiff had fallen over, and he answered:

"I could not say that he fell over the stone; I could not say what he fell over; I could not tell that. I found out that afterwards."

"Q. Did you not see the carriage stone that was at the curb there when he fell; did you not see it?

"A. I could not see it.

"Q. Did he cover the whole of it?

"A. No, but he must have struck the stone with his foot and fell uppermost.

"Q. Did you not see what he had struck?

"A. No, not until after awhile we found out.

"Q. When did you find out what it was that he had struck?

"A. The moment after I came down and seen him lying right over the carriage stone."

Another witness, G. A. SEEGAR, testified on behalf of the plaintiff and corroborated him; could not say whether the wagon had moved up after plaintiff had gone into the Saengerbund; he did not move the horse, but they sometimes take a step ahead or a step back. He testified that he saw the carriage step and knew that it was there; *that when he was ten or fifteen feet away he could not see it, nor could he see it when he was a few feet away from it; but he was walking up and down on the pavement alongside of the wagon and when he got up to the step he could see it.*

Another witness, AMELIA BORCHARDINE, testified that she knew the location of the carriage stone which the plaintiff fell over in 1895, and knew the condition of the lights surrounding it in that year, and that the place where the carriage step is located is very dark, and that she had fallen over it one time herself.

The defendant produced a lot of witnesses who testified to the condition of the lights surrounding the carriage step on other nights than the night of the accident, but did not produce any witnesses who could tell anything about the condition of the lights surrounding the stone on the night of the accident.

On the whole evidence the defendant moved the court to instruct the jury to render a verdict for the defendant on the ground that the plaintiff had failed to make out a case. Over the objection of plaintiff the court granted the motion. The jury returned a verdict, in accordance with the court's direction, for the defendant; to which plaintiff excepted to and appealed to the Court of Appeals, and on the 28th day of October, 1902 (Record, p. 6), the Court of Appeals affirmed the judgment of the supreme court of the District of Columbia and the writ of error was sued out to this court.

ASSIGNMENT OF ERRORS.

1. The trial court erred in holding that as matter of law the jury should be instructed to return a verdict for the defendant.

2. The trial court erred in holding as matter of law that a stepping stone is not an unlawful obstruction.

3. The trial court erred in holding as matter of law that the stone over which the plaintiff fell was a lawful obstruction.

4. The trial court erred in holding that there was no duty on the part of the defendant in error to so light C street northwest as to disclose the existence of this stone thereon.

ARGUMENT.

The record showing so conclusively that the plaintiff in error had no knowledge of the existence of the stone over which he fell, which said stone was upon the sidewalk in front of 314 C street northwest, in the city of Washington, and the record further showing that he did not see the stone at the time that he stumbled over the same, nor could he, on account of the darkness, have seen the same, no question of contributory negligence can arise in this case, and therefore we have the following propositions:

1. Whether or not the stone was an unlawful obstruction *per se.*

2. Whether or not, as matter of law, it was the duty of the District of Columbia to so light this street as to show the existence of this stone thereon, they having full knowledge thereof.

First. Whether or not the stone was an unlawful obstruction per se.

The plaintiff in error contends that this carriage step in question was an unlawful obstruction in the street and a nuisance *per se* on account of the fact that its existence thereon is contrary to sections 222 to 230, inclusive, of the Revised Statutes of the District of Columbia, pages 25 to 26.

Section 222 reads as follows:

> "No open space, public reservation, or other public grounds in the city of Washington, nor any portion of the public streets and avenues of said city, shall be occupied by any private person or for any private purpose whatever."

This section conclusively shows that a private person has no right whatever to use the public streets of the city of Washington for any private purpose, and therefore, when he does so, he violates this section. The testimony in this case shows that this carriage step was used for a private purpose, was no part of the construction of the street or necessary for any municipal purposes or beneficial to the public in general.

That an obstruction on a public street of the city of Washington is a nuisance *per se* was decided in the case of United States *vs.* Cole, 18 D. C., 504. In that case the supreme court of the District of Columbia, in general term, held that a party cannot justify the erection of an obstruction on the streets of the city of Washington by producing a permit from the municipal authorities to make such erection.

The Court of Appeals, in deciding this case, Wolf *vs.* The District of Columbia, 21 Appeals D. C., 464, speaking of carriage steps, say:

> "They are objects allowed and authorized, by immemorial custom and usage, as being necessary to the health, convenience, protection and enjoyment of the homes and lives of the inhabitants of the city,"

and they cite as an authority for this expression certain cases in the State courts; but it must be remembered that in the States, and we might say everywhere else except in the District of Columbia, the fee of the streets is not in the municipality or the State, but in the abutting land-owner, and such land-owner has the right to use the street for his own private purposes so long as he does not inconvenience the public or use the same against some positive law, so that the authorities from the States can have no weight in the question involved in this case. Here the fee is in the United States; here the United States has by statute, sections heretofore referred to, prohibited the placing of obstructions on the streets, avenues, or sidewalks, and therefore

any obstruction thereon, as permanent as the obstruction in this case is shown to be, must necessarily be unlawful.

Under section 229 of the Revised Statutes, it would appear that in some cases the duty of removing these obstructions is placed in the Chief of Engineers, but this cannot in any way affect the duty imposed upon the District of Columbia as a municipal corporation to enforce all laws and regulations for the protection of the inhabitants of said city; but irrespective of the authority attempted to be reposed in the Chief of Engineers in section 229, section 222 refers to *all* obstructions and *all* public streets and avenues of the city of Washington, and does not attempt to limit it to streets, avenues, or sidewalks improved by the United States. These sections here referred to clearly make an obstruction of any kind unlawful, and there is no question but that it is the duty of a municipal corporation to cause all unlawful obstructions on the streets, avenues, etc., to be removed. This is such a well known and understood principle underlying the obligations of every municipal corporation that we shall not cite authorities *in extenso*, but merely refer to the following cases which seem to be in point:

City of Scranton *vs.* Catterson, 94 Pa., 203.
Davis *vs.* City of Austin, 22 Tex. Civ. App., 460.

Davis *vs.* City of Austin is a case where a similar object to the one in question was allowed to remain on the sidewalk, and that court held that it was an unlawful and dangerous obstruction, and the plaintiff Davis was entitled to recover.

We assume that there can be no contention that the District of Columbia is not liable to the same extent that other municipal corporations are, as this question seems to have been well settled in the following cases:

Barnes *vs.* District of Columbia, 91 U. S., 540.
Woodbury *vs.* District of Columbia, 136 U. S., 450.

The defendant in error contended in the Court of Appeals that the sections of the Revised Statutes of the District of Columbia heretofore referred to, taking them as a whole, provided for the removal of obstructions only on streets, avenues, or sidewalks improved by the United States, and that there was no evidence in this record, although the record shows that the street has been improved, that it was done by the United States. It might well be contended that this court could take judicial notice of the fact that the United States is in partnership with the District of Columbia in the improvement and care of all the streets in the city of Washington, and that therefore every improvement of a street in the city of Washington was improved in part by the United States; but it is submitted that there is nothing in this contention, for, if the sections before referred to apply only to those streets improved by the United States, there is in effect in this District, as far as unimproved streets are concerned, the ordinance of the corporation of Washington enacted on November 22, 1862, which ordinance provides as follows:

> "No open space, public reservation, street, or any public grounds in this city shall be occupied by any private person, or for any private purpose whatever, under a penalty of not more than fifty dollars, nor less than twenty-five dollars per day for every day or part of a day such place shall be occupied, to be collected as other fines, penalties and forfeitures are collected for the use of the city."

And therefore it is not necessary for us, in order to show that this carriage step is an obstruction *per se*, to go into the question of who improved this street. It might, however, be contended that the invoking of this ordinance would admit that the District of Columbia had authority to permit persons to place obstructions in the streets. The invoking of this ordinance in no way admits such to be the law. It has been decided that a permit is of no value and that the

occupation of the public streets, spaces, etc., by a private person for private purposes is unlawful, but it has not been decided that the District of Columbia cannot, in cases that do not come within the act of Congress heretofore referred to, provide a punishment for those persons who unlawfully use the streets.

District of Columbia *vs.* Libbey, 9 App. D. C., 321.
Curry *vs.* District of Columbia, 14 App. D. C., 423.

The attorneys for the District of Columbia in the Court of Appeals, without proving any such ordinance existed, cited as an authority for placing this stone on the public streets page 23 of the Police Regulations passed March 12, 1895, which reads as follows:

> "Carriage blocks shall not exceed in dimensions 30 inches by 15 inches, by 8 inches in height."

If the District of Columbia had power to pass this ordinance, which power, we insist, does not exist, the facts in this case show conclusively that the stone here in question violates this ordinance. Therefore it would appear that instead of this ordinance, if valid, justifying the erection of the stone it would make it an unlawful obstruction *per se* if the stone in its shape violates the ordinance.

Mrs. Francis Wolff (Record, p. 17), speaking of the stepping stone as she called it, says:

> "It was about ten or twelve inches high, witness thinks, and the width was about the same, and in length about two and a half to three feet, but witness is not sure."

Otto Borchardine (Record, p. 20), speaking of this stone, says:

> "The street was very dark, according to my knowledge, and there was no light shining on this stone

> that I saw. I guess it was a brown stone, and the size might be from twenty-two to twenty-four inches in length, by ten to twelve inches in height, and sixteen or eighteen inches wide."

G. A. SEEGAR (Record, p. 23), speaking of this stone, says:

> "That there was no light on the stone, and that it was a dark brown sandstone in color, and the pavement was an old brick pavement with many holes in it, and that the stone was about one foot high and about twelve to fifteen inches wide, and the witness thinks it was about two feet long."

Against this the defendant offered the testimony of EDWARD V. MURPHY (Record, p. 27), who could not testify in regard to the stone in question, but states that there was a similar stone in front of his brother's house, No. 312 C street; "that it (speaking of the stone in front of his brother's house) was a brownstone step, something like two feet long, possibly one foot wide, or a little more than that."

And further the defendant produced GEORGE C. BURNS, who testified "that the dimensions of the carriage step in front of No. 312 C street (being the adjoining house to Saengerbund hall) are twenty-nine and three-eighths inches long, thirteen and three-fourths inches wide, and with a rise from the sidewalk of seven and one-fourth inches;" but this witness does not testify that he ever measured same, and you cannot take the testimony of this witness as conclusive on this point when the record shows the other testimony in this case. Neither Murphy nor Burns ever measured the stone here in question, and Murphy never, other than by looking at the two, made a comparison between the two stones, so that even if it were admitted that Burns measured the one stone, that could not be conclusive of the size of the stone here in dispute, and the question of fact involved in its size would be one that would have to be decided by a jury.

The Court of Appeals, in holding that the obstruction here in question was a lawful obstruction, relied upon the case of Dubois *vs.* Kingston, 102 N. Y., 219, and on the case of Robert *vs.* Powell, 168 N. Y., 411. While contending on our part that these cases cannot apply to an obstruction that exists on the streets in the city of Washington, still an examination of these cases will show that the decision rested upon the question of contributory negligence, and what is therein said about an obstruction of this character being a lawful obstruction is mere *obiter dictum*. On authority of the case in 102 N. Y. rests all of the other decisions on this point, and in no decision do we find the question carefully considered except in the case of Davis *vs.* The City of Austin, 22 Tex. Civ. App, 460, where the court, after a careful consideration, arrives at a different conclusion.

It is submitted that the trial court erred in holding this a lawful obstruction.

Second. Whether or not, as matter of law, it was the duty of the District of Columbia to so light this street as to show the existence of this stone thereon, they having full knowledge thereof.

The record shows that C street at the place where this carriage step was situated was so dark that the carriage step could only be seen at a distance within six feet, although there was no obstruction between it and those approaching it; that it was very dark at this particular part of the street, and that other people had fallen over the carriage step.

The duty of the municipality of the District of Columbia to properly light the streets is fixed by sections 232 and 233 of the Revised Statutes of the District of Columbia, page 27.

Section 233 reads as follows:

> "The proper authorities are directed to increase, from time to time, as the public good may require, the number of street lamps on any of the streets, lanes,

alleys, public ways and grounds in the city of Washington, and to do any and all things pertaining to the well lighting of the city."

Here we have the direct duty imposed upon the municipal government to properly light its streets, and it can hardly be supposed that this duty was fulfilled when lamps were so placed in this street that when lighted they failed to disclose objects the size of this stone. The testimony shows conclusively that this stone could not be seen unless you were right at it. Can it be contended for a moment that there was not such a duty imposed on the District to light the streets so that the person traveling thereon could see objects such as the object here in question? If it is not incumbent upon the District to so light the streets, what are the lights for? Where this duty is imposed a person has a right to suppose that such duty is performed, and a traveler lawfully on the public sidewalk is not compelled to use extreme and extraordinary care while using such sidewalk.

Did not the plaintiff in error have a right to assume that the street was free and clear of obstructions and in using same he would only be required to use such care as a reasonable, prudent man would use, assuming the sidewalk to be free from any obstructions, or, if there were obstructions on the sidewalk, the same would be observable from a reasonable distance; or, in other words, that a light placed on a street by the municipal authorities would be sufficiently bright to disclose any objects at a reasonable distance that may be in a pedestrian's path, and if this is so, which we contend is the law in this jurisdiction, then the facts as disclosed by the record in this case unquestionably establish such a case as would allow plaintiff in error to have his case tried before a jury.

The defendant in error will cite certain authorities to sustain the position that it is not incumbent upon a municipal government to light its streets. These authorities are from

State courts, and can in no way be applicable to this case, as here we are governed by the act of Congress which imposes the duty upon the defendant in error to properly light its streets.

The Court of Appeals, in speaking of this question, says:

> "But whatever insufficiency may have existed in the light upon the occasion of the accident, (if any in sufficiency did in fact exist) such an action as the present is not the remedy for the consequences of such defect. Money is annually appropriated by Congress for lighting the streets of the city; but whether such appropriation be sufficient or insufficient the courts cannot determine; nor can they determine how the lights should be distributed through the city; or how any part of the street or section of a street shall be lighted, whether by few or many lights, or whether by gas or electricity. These are matters that are confided exclusively to the judgment and discretion of the municipal authorities."

If this statement of the Court of Appeals be law in the District of Columbia, then the District of Columbia is not liable for any injury sustained by any person upon the public streets of the city of Washington, unless that injury be sustained by the commission and not the omission of an act or acts of the municipality. We concede that the citizens of the District of Columbia have nothing to say as to what streets shall be improved; as to how much money shall be appropriated for that purpose. We concede that Congress can give them a certain sum of money and can, by its act, regulate the use thereof, but can this for a moment in any way affect the liability of the municipality?

This court has held over and over again that the District of Columbia is liable for injuries that are occasioned by defective streets, as, for instance, a hole in the sidewalk, a bad sewer trap, and defects of that character, and the District of Columbia has never yet attempted to set up in cases of this character the fact that Congress gave them no money to

remedy the defect. Can it be said for a moment that they would not be liable for an injury occasioned by lumber placed in the street because they had not sufficient appropriation to remove it or sufficient money to buy lights and oil to show where it is situated? It is submitted that any such contention is absolutely contrary to all authority, and that the only question here involved is the question of duty, and that the defendant has no right to attempt to relieve itself of liability by attempting to set up any such contention.

In this case the defendant in error made no such contention and the record is entirely silent on that point. There is no evidence that they did not have sufficient funds, and, even if they had, that would not be a defense, as before stated, for such a defense would not be recognized by any authority in existence other than the expression of the Court of Appeals in this particular case.

It is therefore respectfully submitted that the judgment of the Court of Appeals should be reversed and the case remanded to them, directing them to reverse their judgment and remand the case for a new trial.

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Attorneys for Plaintiff in Error.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 62.

ABRAHAM WOLFF, PLAINTIFF IN ERROR,

v.

THE DISTRICT OF COLUMBIA.

BRIEF FOR DISTRICT OF COLUMBIA.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 18552

SUPREME COURT OF THE UNITED STATES.

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ABRAHAM WOLFF, PLAINTIFF IN ERROR,

v.

THE DISTRICT OF COLUMBIA.

BRIEF ON BEHALF OF DEFENDANT IN ERROR.

STATEMENT OF THE CASE.

The cause of action alleged in this case is set forth in an amended declaration (Record, pages 3 and 4), which avers the existence of the defendant in error as a municipal body corporate and its duty to keep the sidewalks within the District of Columbia free from obstruction, nuisance, or incumbrance, and particularly C street northwest, in the city of Washington, safe for travel of all wayfarers, including the plaintiff. The breach of duty of the defendant averred is that defendant wrongfully and negligently allowed "a certain large stone, several inches in height above the surface of the sidewalk, *usually termed a carriage step*," "to incumber and impede that part of said sidewalk which was oppo-

site and in front of a certain house, to wit, known as Saengerbund hall, between Third and Four-and-a-half streets, on C street northwest," during the night-time of the 27th day of October, 1895, while said street was enveloped in darkness, without fixing any light or signal at or near said stone, and without placing any watchman or other person to warn plaintiff of its existence, position, and location, and without placing any guard or screen around said stone, by means of which the plaintiff stumbled and tripped against and fell over said stone and was injured without any neglect on his part, to the damage of the plaintiff in the sum of $25,000.

To this *narr.* the general issue was pleaded, and the cause proceeded to trial under the evidence contained in the bill of exceptions. It would seem from this declaration that the pleader supposed that it was the duty of the defendant to keep the sidewalks mentioned absolutely safe. The location and size of the stone is omitted, and the pleader concludes or assumes that the law required lights about, watchmen near, or guards around this stone.

These matters were put in issue and disposed of by affirmative proof of legality in size and location of this carriage step and the consequent absence, therefore, of any duty to light or guard it.

The Saengerbund hall consisted of premises No. 314 C street northwest, in the city of Washington, at the time of the trial and at the time of the plaintiff's injury.

Daniel Murphy purchased premises No. 314 C street northwest, and moved there in the fall of 1875, and there resided until his death, about 1894 or, possibly, 1895 (testimony of Edward V. Murphy, Record, page 27).

The same witness testified that Daniel Murphy died since

1896, and that "the carriage step mentioned was in front of the premises and has been in front of the premises ever since witness can remember and long before his brother took possession of that house; and that it is his impression that it was put there when the house was built, and that the stone remained there down to the time of the death of Daniel Murphy; that it was a brown-stone step something like two feet long, possibly one foot wide or a little more than that. *That the stone in front of the adjoining premises and the stone that was spoken of are precisely the same*" (Record, middle of page 27).

The adjoining premises spoken of is house No. 312 C street northwest, and a new cement sidewalk had been laid in front of No. 314 C street about two years previous to the trial, and the carriage step in question was then given away by the Saengerbund Society and removed. (See testimony of Adolf Levy, Record, top of page 29; Frank Claudy, bottom of page 29.) Uncontradicted evidence was given which showed that the carriage step in front of premises No. 312 was identical with the step in question.

Adolf Levy says, "*the carriage step in front of 312 C street is identically the same*" (Record, top of page 29).

The measurement of the carriage step remaining in front of premises 312 C street showed that its dimensions are $29\frac{3}{8}$ inches long, $13\frac{3}{4}$ inches wide, and with a rise from the sidewalk of $7\frac{1}{4}$ inches, which under the evidence thus established the same dimensions for the carriage step in question.

While the plaintiff was testifying (Record, middle of page 16) certain photographs showing the actual location and appearance of both mentioned carriage steps and demonstrating that both of said carriage steps, prior to the plaintiff's

accident and during the occupation of the premises No. 314 C street northwest by the Saengerbund Society, were located outside of the traveled way, at the proper place on the sidewalk, next to the curb line, immediately in front of the main entrances to the two buildings. The Record (page 16) states:

"On recross-examination certain photographs were shown by counsel for defendant to counsel for plaintiff, and thereupon counsel for plaintiff said: I will consent that those pictures shall go in evidence. One of said pictures, being a photograph of the Saengerbund house, was shown to the witness who testified that he recollected seeing the building, except that he did not recollect the decorations thereon which were shown in the photograph, and that the building looks that way outside of the decorations. Counsel for plaintiff thereupon admitted that the photograph shown was the photograph of the building and that it showed the carriage step; and thereupon, witness continuing, said: On the occasion of the injury it seemed to me as though it (carriage step) was almost in the center of the building. The photograph, showing carriage step and building, was exhibited to the jury."

This photograph was exhibited to Mrs. Wolff, a witness for the plaintiff, and she testified (Record, middle of page 18) "that the position of the carriage step on that night (the night of said accident) is the same as shown in the picture."

There is not, it will be observed, any claim that under the evidence in this case the particular carriage step over which the plaintiff fell was improperly or unusually located, nor that it was of size or dimensions contrary to the regulations. The plaintiff offered no evidence on these questions, and the evidence of the defendant established the fact of

proper location, size, and dimensions. Neither had there been any "change in the steps of the Saengerbund" since 1893, nor in "the said carriage step" until its removal by this society after the plaintiff's accident, as before noted. (See testimony of Adolf Levy, Record, bottom of page 28 and top of page 29; testimony of Frank Claudy, Record, bottom of page 29; John Waldman, George Smith, and George H. Kolb, Record, middle of page 30.)

The accident occurred on Sunday, October 27, 1895 (Record, top of page 7), according to the plaintiff, "around nine o'clock" in the evening. "*The stars were shining and I knew it was a very bright night.*" "*It was a bright moonlight night*" (testimony of plaintiff, cross-examination, middle of page 10 and top of page 14), and "the night was clear" (testimony of Mrs. Francis Wolff, Record, top of page 17). Mrs. Wolff also testified that the plaintiff and party left the country place of Mr. Borchardine in a light grocer's wagon, between seven and eight o'clock, and arrived at the place of the accident in "about an hour or little more" (Record, bottom of page 16).

The remaining evidence on the light question is addressed to the lighted condition of the street—in which the location and condition of the foliage of the trees there, the position of the street lamps, and the lights from the Saengerbund premises is described.

The absence or presence of light or no light made no impression whatever on the plaintiff, and the reasons for his lack of knowledge and carelessness of inspection will be disclosed when the cause of his injury is considered. The plaintiff testified (Record, middle of page 8):

"*I could not say whether there was any light there or not.* I could not say whether there were any lamps there or not; but it was dark, I know that; *coming out of the light house it was dark naturally.* There was no light whatever. The trees were in full bloom at the time and covered almost from one side of the street to the other and the first time I ever saw that stone was after I fell over it."

The plaintiff further testified that "there was no light in the *vestibule* (of the Saengerbund premises) that night, but *there was a light in the hall, on the inside*" (Record, bottom of page 9); that he "did not see any lamp on the other side of the street," "*for I never looked there*" (Record, middle of page 10). "There was a light inside the building, in the center of the ceiling, I suppose. I could not tell you where it was exactly. There was a light, I know that" (plaintiff's testimony, Record, near bottom of page 10). The plaintiff also testified that "the carriage step was right in the line where I came down the steps, and right straight out" (Record, just above the middle of page 13). The plaintiff also testified: "*Certainly, if I was standing on the sidewalk and looked, I think I could have seen it* (the carriage step) *if I had looked down*" (Record, middle of page 15). The plaintiff does not testify that there was any obstruction which prevented him from seeing the carriage step, and as he knows nothing about the outside lights, because he did not notice them and was not looking for them, the evidence on this point must be gathered from other witnesses.

C street northwest at the place of the accident is a comparatively narrow street. Mrs. Wolff, the plaintiff's witness, who sat in the wagon waiting for Mr. Borchardine and plaintiff, to come out of the Saengerbund, saw the stone

after the plaintiff fell over it (Record, top of page 17), and she says there was a gas lamp across the street, with trees between, and a light from the hall window of the Saengerbund (Record, top of page 17). This lighted gas lamp "across the street was to the middle of the street," says Mrs. Wolff (Record, middle of page 17). She saw this light illuminating the roadway and testified: "*I could see very plain where he had fallen after he fell.*" "You could see the leaves on the middle of the street from the reflection of the light, and the wagon was *a little distance* from the stone when they came out;" "about two feet from the carriage stone parallel with the sidewalk" (Record, middle of page 17).

This way so lighted by the gas lamp across the street was interrupted, under the evidence, by the trees there from the *inference* only of this witness, because she says, "I guess it was behind the trees" (Record, middle of page 19).

It appears that when the party in the wagon stopped in front of this hall it was for the purpose of affording the plaintiff and his friend Borchardine an opportunity to drink some beer and to get cigars. The accident occurred after the drinks and cigars had been procured and the plaintiff was hastening ahead of Borchardine to reach the wagon.

Borchardine was a member of the Saengerbund and says that the Society moved into premises 314 C street in 1892 or 1893, and that he "saw that stone every day when we went to rehearsal" (Record, bottom of page 20). He testified in the plaintiff's behalf and established that there was an additional light on the same side of the street, "near the alley." Respecting the position of the stone, considered with reference to the stairway of the hall, he testified, "the stone

was lying right about the middle of the stairway" (Record, middle of page 21).

The driver of the wagon was one G. A. Seegar, who, while Borchardine and plaintiff were inside the building, paced the sidewalk, sometimes being within six feet of the carriage step and sometimes 10 or 15 feet away from it (Record, bottom of page 24). He saw the carriage step when at the foot of the steps of the Saengerbund hall, the width of the pavement being between (Record, top of page 25).

He also testified that "there was a light inside the Saengerbund, inside the hall, which shone through the glass door," and he says there was a lamp on the other side of the street, "catercornered" (Record, middle of page 25).

The plaintiff also established by the evidence of Amelia Borchardine that there was a lamp on the corner of the alley, on the same side of the street, in 1895, but she fixes no particular time (Record, middle of page 25).

Some of the plaintiff's witnesses said in general terms that they did not know whether there was a tree in front of these premises or not at the time of the accident. The purpose of this inquiry was to establish that a tree existing there at the time of the trial was there at the time of the accident, and to claim that it in a measure obstructed the light from the lamp on the same side of the street.

This tree is spoken of as a "little tree" (Burns, Record, bottom of page 27), 2 inches to 1½ inches in diameter (Record, top of page 28), and was planted about a year or the spring before the trial, which occurred in January, 1902 (Kanhan, Record, top of page 28).

The nearest tree on the side of C street where the accident occurred was about twelve feet distant from the center of

the steps of the Saengerbund (Record, bottom of page 27), and did not obstruct a clear view of the carriage step.

It was, moreover, abundantly established by uncontradicted evidence that at the time of the accident (Record, page 29) the steps and sidewalk there were lighted by a large lantern in the vestibule, a light in the hallway, and other lamps in the house, which made the steps and pavement in front of this club-house "as bright as a moonlight night." Indeed, Sunday night was and is the night on which this club-house was most patronized, and "every Sunday evening" it was the practice "to light up everything that was 'lightable'" (Claudy, Record, bottom of page 29), and "when all the lights are lit it is absolutely impossible not to see that stone when you are on the top of the steps or coming down" them (Claudy, Record, top of page 30). If there could be any liability because of a deficiency of light on this street, the evidence on behalf of both parties failed to establish a want of it.

The evidence in part above recited, we respectfully submit, conclusively establishes that this sidewalk was reasonably safe for pedestrians.

That the plaintiff was guilty of gross negligence, which contributed directly to his injury and was the proximate cause of it, is established by many facts, prominent among which are the speed with which the defendant descended the Saengerbund steps, his frantic rush across the pavement from the building line to the curb line, and the violence of his fall.

There were three persons, who from three different locations witnessed the event which resulted in the plaintiff's injury.

One was Mrs. Frances Wolff, who was seated in the wagon; another was G. A. Seegar, the driver of the vehicle, who was on the sidewalk, and the third was Otto Borchardine, who was on the platform of the Saengerbund steps.

In order to ascertain what opportunity Mrs. Wolff had to see the carriage step, it is necessary to locate her position in the wagon, and the situation of the wagon with reference to the curb line, carriage step, and other surroundings.

The plaintiff testified: "The (side of the) wagon stood not quite two feet away from the stone *after I fell over it*, the horse facing towards Four-and-a-half street, and back of the wagon was away from the stone" (Record, top of page 8). The wagon blinds were down (Record, top of page 9). "The end of the wagon *when I got out* was past the entrance of the Saengerbund building, but I really could not say how far—a foot, or three feet, or how far it was" (Record, near bottom of page 9). "I got on the wheel and got off the wagon. Certainly, I stepped on the wheel and got off the wagon." Being asked which wheel he stepped on, witness says: "I was sitting in the back part of the wagon and must have stepped on the back wheel" (Record, bottom of page 9 and top of page 10).

"The shades were down, certainly; they just hung down there, and you lifted them up and got out. I lifted the shades, certainly" (Record, top of page 10).

Mrs. Wolff differs from the plaintiff in several particulars. She testified he got out of *the back of the wagon* (Record, bottom of page 16), and testified that wagon stood parallel to the sidewalk, with the horse facing towards Third street, when plaintiff came out of the hall (Record, top of page 17). "When we got to Saengerbund hall that night," witness says,

"I cannot tell how the team was facing" (Record, top of page 18). "After plaintiff and Mr. Borchardine got out of the wagon it moved a little towards the end; it made it straight with the sidewalk" (Record, top of page 18).

This "witness faced the tail end of the wagon, and the back of the wagon was a little distance from the stone, parallel to the sidewalk, about two feet. *The wagon did not turn around*, did not go any distance away, just straightened out." "Witness could not see through the curtains in the wagon. *Witness was on the side of the wagon facing Saengerbund hall, the last seat of the wagon.*" This witness said on direct examination that she "*could not see the steps of the Saengerbund hall from where she was sitting, (but) could see up the steps:* (that) the wagon was not slanting, but the witness was sitting slanting," and that she did not see the carriage step before the plaintiff fell over it (Record, top of page 17). We therefore understand that the steps leading in and out of this hall and the carriage step were not within the line of Mrs. Wolff's vision, but that the hall entrance was. She was in a darkened wagon, with her range of vision diverted both from the entrance steps mentioned and the carriage step, and her conclusions whether the plaintiff or any other pedestrian had sufficient light to see the carriage step are of no value; but when she looked towards the carriage step, which she did after the plaintiff fell, she saw it (Record, top of page 17).

It is not surprising, then, to find from the testimony of Otto Borchardine that the plaintiff (if plaintiff's testimony is to be the guide) must have placed his foot on or in immediate proximity to the carriage step when he got out of the wagon, and to find that he located the carriage step at that time, where it undoubtedly was, between the wheels of the

wagon. He says, "the stone was right in between the two wheels" (Record, middle of page 20).

Borchardine says when plaintiff and himself got out of the wagon the wheels of the wagon were "right on the curb, snug against the curb" (Record, near bottom of page 21). Nor could the wagon have moved to any considerable extent, because Borchardine testified that when the plaintiff fell "the end of the wheel was right at the carriage stone, one end of the carriage stone" (Record, bottom of page 22). This witness further testified that when he "came out of the Saengerbund the horse remained with his head to Third street" (Record, top of page 22).

G. A. Seegar, who was the driver of the wagon and in charge of it, and who therefore knew whether he turned it around, as the plaintiff had testified, says that it was not turned around.

"Q. Did your wagon move after you stopped until Mr. Wolff came out? A. I don't know, sir; it may have moved a few inches. You know just how a horse is—sometimes he takes a step ahead or a step back. I did not have to move him to get the wagon into a better position, so that the wagon was in about the same position when Mr. Wolff and Mr. Borchardine came out as it was when they went in. My wagon was right close up to the curb, not further away than an inch or two, and when I drove up to the Saengerbund I drove into the line of the curb, so as to get as near as possible" (Record, top of page 24).

This witness further testified that the end of the wagon was near the carriage step; "that the carriage step was covered a little ways with the hind wheel," perhaps half way or one-third of the way, and he "found that out later,

because (he says) I stepped down from the wagon and walked around the pavement and saw it" (Record, middle of page 24). It also appeared from Seegar's testimony that the horse faced east (Record, top of page 24). The result of this testimony is to bring this witness nearly in accord with Borchardine, and to establish that the wagon covered the carriage step more or less. It also shows that the carriage step could not have been within the line of Mrs. Wolff's vision.

Now Borchardine had previous knowledge of the existence of the carriage step. He "*had noticed the stone many times before the accident*, but did not take any notice of the stone that night" (Record, bottom of page 20). Such notice that night was, of course, unnecessary to him.

Therefore the absence of notice of the carriage step prior to the accident to both Mrs. Wolff and Borchardine was the result of other causes than the want of sufficient light about or upon it. On this point of sufficient light their evidence is immaterial. G. A. Seegar was, however, in the position of a pedestrian, and he saw the carriage step while walking along the pavement, and it did not obstruct his reasonable and free use of the sidewalk.

We quote from Seegar's testimony (Record, bottom of page 24 and top of page 25):

"Q. While you were walking up and down the sidewalk, did you see this carriage step? A. Yes, sir.

"Q. How far were you away from the carriage step while you were walking up and down the sidewalk? A. Different distances; sometimes six feet, sometimes maybe 10 or 15 feet. Witness says that when he was ten or fifteen feet away he could not see the carriage step, nor when he was 6 feet away could he see it.

"Q. Then when did you see it? A. When I was near it.

"Q. What do you mean by near it? A. When I go close to the step.

"Q. What do you mean by close to the step? A. To the Saengerbund steps.

"Q. What do you mean by being close to the steps—do you mean at the foot of the steps? A. Yes.

"Q. When you were at the foot of the steps and would turn around and look, could you see the carriage step? A. Yes, sir.

"Q. How far is the foot of those steps from the carriage step? It is the width of the pavement, is it not? A. Pretty near it."

Recurring now to the plaintiff's evidence, it is apparent, we submit, that had he looked for the usual curb-line accessories he would have seen the carriage step.

We briefly review his evidence from the time he started on his return to the wagon from Saengerbund hall.

First, he saw the wagon (Record, bottom of page 10 and near top of page 11): "Certainly I saw the wagon" (Record, top of page 13), and "the carriage step was right in the line where I came down the steps and right straight out" (Record, near top of page 13); but he did not see it (Record, bottom of page 13). "I said the stone was brown because I heard that afterwards; of course I don't know. After I was laid up in bed somebody came in and told me" (Record, bottom of page 13 and top of page 14).

Second, he knew there was a gutter there (Record, top of page 16); and, third, he says: "*I could see the middle of the street*" (Record, top of page 16).

The plaintiff's evidence discloses that while approaching

this gutter and curb-line he did not look for any of the usual things to be found there.

The plaintiff testified (Record, page 15):

"Q. If you had looked when you came down the steps, you could have seen the carriage step, could you not? A. Not if I looked ahead of myself. Not if I looked straight out.

"Q. Were you intending to fly or to walk? A. No sir, it was dark, I could not see that step.

"Q. If you had looked in the direction in which you intended to walk, could you not have seen the carriage step? A. In the direction? No sir, I do not think I could.

"Q. Why not? A. Because it was dark. *Certainly, if I was standing on the sidewalk and looked, I think I could have seen it if I had looked down.*

"Q. Exactly. When you reached the sidewalk after you had left the steps? A. Yes sir.

"Q. If you had looked in the direction in which you were going, could you have seen the carriage step? A. No, sir; I did look in the direction in which I was going, but *I was looking right out before me.*

"Q. What were you looking at? A. I was looking where I was walking.

"Q. How were you walking, on the ground? A. What?

"Q. *If you were looking where you were walking you ought to have been looking on the ground? A. No sir.*

"Q. What were you looking at? A. *I was looking right straight ahead, not with my head down.*

"Q. *Right straight ahead?* A. *Yes sir.*

"Q. *At what object?* A. *Not at any particular object at all.*

"Q. You were going to the curbstone, were you not? A. Yes sir; going to walk out into the street to get around and get into the wagon.

"Q. And you intended to go into the roadway and get into the wagon? A. Into the wagon, yes sir."

The rapid pace of the plaintiff and the great violence with which he fell shows his disregard of every ordinary precaution. The evidence on this subject is clear and free from dispute.

The plaintiff says (Record, page 10):

"Q. How was it that you went ahead of Mr. Borchardine? You came out first? A. *I wanted to get down in the wagon first.* I wanted to give him a chance to get in the wagon, and I was going out in the street to get around the wagon to get in on the other side of the wagon so as to waste no time.

"Q. So that you were hurrying to get down to the wagon first? A. Not exactly hurrying. *I wanted to get down in the street and get in the wagon, so that I walked fast downstairs naturally,* and I wanted to get home.

"Q. You walked fast down the stairs? A. *Came fast down the stairs.*

"Q. You say you hastened down to get around and give Mr. Borchardine a chance, didn't you? A. Yes, sir, to get around the wagon."

Record, middle of page 11.

"Q. You were hastening along to get to the wagon? A. Not exactly hastening, I was going in a hurry.

"Q. In a hurry? A. Yes, sir, not hastening."

Record, near bottom of page 12.

"Q. Isn't it a fact that you were hastening—running? A. I was not *exactly* running; I was walking fast.

"Q. Trotting? A. No, sir; not trotting, just walking fast."

Record, near bottom of page 13.

When he fell over the carriage step, he says, his body went "right into the street. Right out into the *middle* of

the street" (Record, middle of page 14), and he did not pull himself out into the street.

Mrs. Wolff testified that when the plaintiff came out of the hall "he came down the stairs and fell over a stone and *flew right in the middle of the street*" (Record, bottom of page 16).

This "witness saw plaintiff come down the steps of Saengerbund hall. Plaintiff came out first and Mr. Borchardine came back of him. The plaintiff *came down quickly*, like any man would come down the stairs, and struck the carriage step, walked right straight out and *flew into the middle of the street, about three or four feet from the curb. He fell over the stone and flew right out into the middle of the street, clear into the roadway.* When the plaintiff fell Mr. Borchardine was on the Saengerbund steps" (Record, middle of page 18).

"Q. You saw him fly through the air? A. Yes sir, *I saw him fly.*

"Q. Did he make a clean sweep? A. *He did not touch anything else before he fell.*

"Q. Then he simply struck the carriage step and flew right out into the middle of the street; is that right? A. That is as much as I can remember, yes.

"Q. *He did not strike the carriage step and fall right over into the gutter?* A. *No, sir.*"

Being asked with what speed plaintiff came down the steps, witness says he came down quickly. "That is the only way I can explain myself."

"Q. What do you mean by saying 'quickly'? A. What I said before, the same as I meant it then, like any man would come down the steps. They don't walk slowly.

"Q. Did he walk slowly across the pavement? A. I don't know how he walked across the pavement; I don't know about the pavement. I seen him come down and *saw him fly from the carriage step into the street*, that is all I know" (Record, middle of page 19).

Otto Borchardine and plaintiff came out of the Saengerbund building together, and while Borchardine turned to close the door the plaintiff descended the steps, crossed the pavement, and fell over the carriage step.

Borchardine testified (Record, bottom of page 21 and top of page 22):

"Q. Where did you stand when he was going down the steps? A. I was on the platform because I shut the door and I was the last one and *I was just about at the platform, on top, when I saw Mr. Abe Wolff roll over the stone.* (Photograph of the premises shown witness and then exhibited to jury,) and witness indicates where he was standing, saying: I was there with intent to go down the stairway. *I was not standing, I intended to go down the stairway and at that same moment I saw Mr. Abe Wolff fall. I was about to go down the stairway.*

"Q. Where was he when you saw him? A. He fell right over the carriage step.

"Q. Had he struck it when you saw him? A. *The only thing I saw was his whole body fly right over.*

"Q. *He was flying over when you started to go down?* A. *Yes.*

"Q. Did you see him going down the steps? A. Yes.

"Q. *How was he going?* A. *Right fast.*

"Q. Was he walking or running? A. You cannot run down the steps.

"Q. If anybody can run down the steps, was he running? If it is possible? A. You cannot run down; he was only going right fast.

"Q. It does not make any difference how fast a person comes down the steps, you would still call it not running? A. Not running."

G. A. SEEGAR testified that he (Record, middle of page 24) saw plaintiff strike the stone and fall over it, and went to his assistance.

"Q. How far did he fall? A. *I think he fell almost the distance of the wagon.*

"Q. Did he fall past the wagon? A. I think he did. If the wagon had backed I think it would have run over his back, and both of the wheels would have run over him. When the plaintiff came down the steps I was standing in front of the horse. I suppose I was taking care of my horse, and I stepped out of the wagon to take a walk along the sidewalk. I was near the head of my horse when the plaintiff came down the steps."

ARGUMENT.

I.

The duty of the municipality to keep the sidewalks reasonably safe for pedestrians was not violated by permitting the stepping stone or carriage block over which the plaintiff in error stumbled to remain on the sidewalk, considering the size and location thereof, custom and usage and the building regulations in force in the city of Washington. Such stone was a legal structure and was not an unlawful obstruction of the sidewalk, nor was it a nuisance, and therefore judgment was properly rendered in favor of the defendant in error.

There was no evidence in this case that the stepping stone or carriage block was within the traveled way.

The evidence on the contrary was that it was without the traveled way.

Neither was there any evidence that such stone was of unusual dimensions.

The evidence was that it was identical with a stone which was within the dimensions prescribed by the building and police regulations in force prior to and at the time of the accident, and there was no defect or peculiarity in the stone which caused the injury of which complaint is made.

Reference to the building and police regulations discloses the following :

January 1, 1877, Building Regulations, page 23, section 23:

"Carriage steps shall not exceed in dimensions three and one-half feet by twenty inches (nothing said about height)."

June 3, 1882, Building Regulations, page 23, section 23:

"Carriage steps shall not exceed in dimensions three and one-half feet by twenty inches (nothing said about height)."

November 1, 1899, Building Regulations, page 24, section 4:

"Carriage steps when authorized shall not exceed in dimensions three and a half feet by twenty inches nor eight inches in height."

June 26, 1891, Building Regulations, page 27, section 11:

"No hitching post, carriage block or other obstruction shall be erected except on a permit issued by the inspector of buildings."

December 1, 1892, Building Regulations, page 28, section 10:

"No hitching post, carriage block, or other obstruction shall be erected except on a permit issued by the inspector of buildings."

May 2, 1894, Building Regulations, page 31, section 10:

"No hitching post, carriage block or other obstruction shall be erected except on a permit issued by the inspector of buildings."

August 8, 1892, Police Regulations, article VIII, section 3, page 14:

"No carriage step shall be erected or located beyond the building line unless a permit therefor shall first have been obtained from the inspector of buildings."

March 12, 1895, Police Regulations, page 23:

"Carriage blocks shall not exceed in dimensions thirty inches by fifteen inches, by eight inches in height."

Article VIII, section 10, page 38, of the present Police Regulations:

"Carriage blocks shall not exceed in dimensions thirty inches by fifteen inches, by eight inches in height, and shall not extend beyond the inner line of the curb."

Projections beyond the building line of houses have always been allowed in the city of Washington (see Webb's Digest, 65; Building Regulations, pp. 80 to 89, inclusive, act of March 3, 1891), and such projections or encroachments (if need be) on the sidewalk have been declared legal obstructions.

"In a populous town, where land is very valuable, it *is not unreasonable* to erect buildings and fences on the line of the street and *to place doors and gates* in them, *so as when opened to swing over the street.*"

O'Lind *v.* Lothrop, 21 Pick., 292–297.

"The owners of lots bordering upon streets or ways have, or may have, in other respects, a right to make *reasonable and proper use* of the street or way. What may be deemed such a use depends, in the absence of legislative or authorized municipal declaration, much upon the local situation and public usage,—that is the use which others similarly situated make of their land—this being evidence of a reasonable use.

"Conformably to these principles, it was held that common and well-established usage in the city of Boston justified the owners of land in erecting thereon warehouses, on

the line of a street or way, with *doors and windows opening upon the way or street*, and shutters projecting into the same, when open, and with sidewalks in front, having on their surface *iron gratings*, for admitting light to and *trap doors* for communicating with, the cellar or underground apartments of the warehouses, and used for putting in and taking out goods."

2 Dillon, Munic. Corp., sec. 734.

The same rule exists in this jurisdiction. In Howes *v.* District of Columbia (2 App. Cases D. C., 193), the court said:

"It is very evident to every one that these sidewalks in their entirety are not intended to be free from obstructions. Steps leading to the doors of houses, steps and areaways leading downwards to the entrance to basements, openings for the admission of light and air to basement windows, projections in the shape of bay windows and other similar constructions on the inner part of such sidewalks, are necessary and recognized obstructions to their free and unlimited use for the purpose of travel over them, and on the outer side we have *carriage steps*, hitching posts, hydrants, pumps, planted trees, over which the public may not pass in freedom. Very generally also we have now a very considerable portion of this alleged sidewalk taken away from this supposed public use by its reservation *for parking purposes*." (See Dist. of Columbia *v.* Libbey, 9 App. Cases D. C., 325.)

These building and police regulations, authorized as they were by Congress, permitted the officials of the municipality to recognize the necessity for carriage steps for the public benefit and convenience, and therefore such steps were not nuisances for injury from which this action can be sustained.

This court has declared:

"That cannot be a nuisance, such as to give a common-law right of action, which the law authorizes."

The Northern Transportation Co. *v.* City of Chicago, 99 U. S., 635.

We find that stepping stones or carriage blocks have been elsewhere judicially determined lawful structures upon the highway.

The placing of a stepping stone of ordinary size and proper construction in a convenient place at the edge of a sidewalk in front of a public building in a city, as an accommodation to the public in alighting from and getting into vehicles, is not such an obstruction of the streets as will charge the municipal corporation with negligence for allowing it to remain, even though five other persons had been injured by falling over it.

Dubois *v.* City of Kingston, 102 N. Y., 219.

In Robert *v.* Powell, 168 N. Y., 414, the court said:

"It is quite true, as the learned counsel for the plaintiff contends, that every unlawful obstruction placed in a public street which endangers the safety of travelers may be regarded as a nuisance, but the question is what object will constitute an unlawful or dangerous obstruction. There are some objects which may be placed in or exist in a public street, such as water hydrants, hitching posts, telegraph poles, awning posts, or stepping stones, such as the one described in this case, which cannot be held to constitute a nuisance. They are in some respects incidental to the proper use of the street as a public highway. The hitching post, for instance, in front of a private residence, is intended, not only for the

convenience of the private individual, but for the safety of the public as well, since it is intended to guard against accidents resulting from runaway teams or horses. It is quite conceivable that a shade tree located within the boundaries of the street or highway may cause an accident or injury to a private individual using the street. But it does not follow that it constitutes a public nuisance in the highway. The stepping stone in this case, located upon the sidewalk in front of a private house, was a reasonable and necessary use of the street, not only for the convenience of the owner of the house, but for other persons who desired to visit or enter the house for business or other lawful purpose. It did not interfere in the least with the use of the roadway or bed of the street; nor did it interfere to any appreciable or unreasonable extent with the use of the sidewalk. There was eight feet of clear open space upon the sidewalk for the use of travelers, and the fact that the plaintiff, while hurrying in the nighttime to take a cab, stumbled over the stone, when the place was well lighted and the object plainly visible, does not prove or tend to prove that the defendant was guilty of any wrong or breach of duty in maintaining the stepping stone in front of her house. It is true that the plaintiff was injured, but that was the result of an accident, due possibly to his own fault, but at all events not to any fault on the part of the defendant, or to any unlawful obstruction by the defendant of the street. The question involved in the case is, we think, well settled by authority (Dubois *v.* City of Kingston, 102 N. Y., 219; Dougherty *v.* Village of Horseheads, 159 N. Y., 154). While it is said that these cases involved only the question of liability on the part of a municipality to negligence, they also decided that the existence of objects of this character in the streets is lawful. If the city could not be held liable for permitting them to be there after notice, neither can the defendant be held liable for placing them there. The question involved in this class of cases is whether the object complained of is usual, reasonable or necessary in

the use of the street by the owner of the premises or any one else."

The statute requires of municipalities the exercise of ordinary care in the construction and maintenance of streets and sidewalks, but that duty is not violated by permitting a carriage block of the usual size to occupy the usual position of such blocks on the sidewalk, near the curb, and not upon that portion of the sidewalk which is designed for the use of pedestrians going upon or passing along the walk.

City of Cincinnati *v.* Fleischer, 63 Ohio St., 229.

A hitching post is not a defect.

Macomber *v.* City of Taunton, 100 Mass., 255.

City of Rockford *v.* Tripp, 83 Ill., 247.

A city's failure to place a fence around a water hydrant which is properly located cannot render it liable for an injury caused by a traveler driving against it. Indeed, the fence would likely be the more dangerous.

City of Vincennes *v.* Thuis, 63 N. E. Rep., 315.

Canavan *v.* City of Oil City, 183 Pa. St., 611.

A municipality has the discretionary power to locate a fire-plug on a sidewalk, and if, in the exercise of such discretion, it places a plug of ordinary diameter on a sidewalk four inches from the curb, it cannot be made liable for personal injuries to a pedestrian who stumbles over the plug.

Horner *v.* City of Philadelphia, 194 Pa. St., 542.

The argument in the court below on behalf of the plaintiff in error asserted that it was the duty of the District

authorities to see that all sidewalks were free from obstructions of every kind and character.

The citations of authority were:

"Sections 22, 225, 226, 227, 229 Revised Statutes of the District of Columbia.

"'It shall be the duty of the Chief of Engineers, in charge of the public buildings and grounds, to cause obstructions of every kind to be removed from streets, avenues and sidewalks in the city of Washington as have been or may be improved in whole or in part by the United States, and keep the same, at all times, free from obstruction' (section 226, Revised Stats.).

"'No * * * portion of the public streets or avenues in said city, shall be occupied by any private person, or for any private purposes whatever' (section 222, Rev. Stats. D. C.).

"U. S. *vs.* Cole, 18 D. C., page 504.

"Libbey *vs.* District of Columbia, 9 App. D. C., page 321.

"Curry *vs.* District of Columbia, 14 D. C. App., page 423.

"This duty imposed on the Chief of Engineers by the act of Congress cannot affect the duty also imposed on the District of Columbia as a municipal corporation, to enforce all laws, regulations, etc., and certainly, when the act of Congress says:

"'If any person shall place any obstruction on the streets, avenues, or sidewalks so improved by the United States, such person shall pay the costs of removing the same, and shall be subject to a penalty of ten dollars, to be recovered as other debts are recovered in said District, for each and every day the obstruction may remain after the Chief of Engineers shall have given notice for its removal' (sec. 229, Rev. Stats., D. C.).

"This section, taken in connection with the other sections referred to, clearly makes an obstruction of any kind unlawful. And there being an unlawful obstruction in the streets of a municipal government, of which it has knowledge, it is certainly its duty to cause same to be removed.

"Barnes *vs.* District of Columbia, 91 U. S., p. 540.

"Woodbury *vs.* District of Columbia, 136 U. S., p. 450."

We regard this argument as begging the question, which is whether the carriage block was an obstruction at all in view of the right to maintain the same at a convenient location on the sidewalk without the traveled way. If carriage steps are illegal we do not see how the city can allow the maintenance at the curb-line of the sidewalk of lamp posts, gas and electric; trees, tree boxes, hitching posts, hydrants, pumps, and fire-plugs which have been so placed and maintained at all times heretofore.

The license and allowance of such structures at convenient places, including the particular structure here inquired of, was within administrative discretion and the due exercise of police power.

For the exercise of such power by its officers in the course of their duty, even though the result was the injury to the plaintiff, we submit that no liability thereby accrued against the municipality.

II.

A consideration of the evidence and all the inferences which the jury could have justifiably drawn from it should result in the conclusion that the negligence of the plaintiff in error, by his failure to exercise his faculties, when approaching at an unusual speed that portion of the sidewalk devoted to obstructions, such as carriage steps and the like, contributed to his injury, even if such structures be considered nuisances and defects in the sidewalk.

The evidence disclosed that the plaintiff in error could have seen the carriage step. But whether such be the fact or not, his approach thereto was so rapid and careless and in such manner as to disclose that he was wholly reckless and devoid of care in the use of the sidewalk. We affirm that in approaching obstructions, including such portions of the sidewalk where carriage steps and the like are located, the traveler should be on his guard is the requirement of the law.

Such is the settled law in this District.

Howes *v.* D. C., 2 App. Cases D. C., 188.

In the above case the accident occurred on a dark night while the gas lamps were lighted—a parallel of the most favorable view for the plaintiff possible in this case. Similarly the lamp-light in the house was shining through the window and plaintiff constantly kept his eyes on that light, which is in correspondence to the action of the plaintiff in the case at bar in keeping his eyes solely fastened on the

wagon in which he intended to enter. There, too, the plaintiff kept right on, *not noticing* the opening before him, and fell headforemost into it, which resembles the action of the present plaintiff in failing to notice the carriage step. Indeed, the plaintiff in the former case was more careful in that he did not act with undue haste, while this plaintiff carelessly and impetuously rushed onward and over the carriage step.

In the Howes case the court applied the rule that "the facts must be such that from them reasonable men, in the exercise of a dispassionate and impartial judgment, could draw but one conclusion," and drew the conclusion from the facts that the plaintiff was guilty of contributory negligence. The court also said:

"It is very evident to every one that these sidewalks in their entirety are not intended to be free from obstructions. Steps leading to the doors of houses, steps and areaways leading downwards to the entrance to basements, openings for the admission of light and air to basement windows, projections in the shape of bay windows and other similar constructions on the inner part of such sidewalks, are necessary and recognized obstructions to their free and unlimited use for the purpose of travel over them, and on the outer side we have *carriage steps*, hitching posts, hydrants, pumps, planted trees, over which the public may not pass in freedom."

Nor do we believe that the use on the curb-line of such a common article or thing as a carriage step was of itself, in view of the many years that carriage steps have existed in the city of Washington without resulting in known injuries to pedestrians, notice that it was necessarily hazardous or dan-

gerous. The authorities were not bound to presume it was dangerous, or that it made the traveled way unsafe for the ordinary and reasonable use of pedestrians. The sidewalks are made for ordinary travel, not for foot races; nor could the District anticipate that one would suddenly cast himself over this carriage step.

In Allis *v.* Columbian University the court instructed the jury that if the plaintiff "by means of ordinary care and prudence *could have seen said step* projecting above the sidewalk, it was incumbent upon her to use all the additional precautions on her part which a person of ordinary prudence would use, in view of the circumstances; and if she did not do so, the plaintiffs are not entitled to recover; provided, such want of care on her part occasioned or directly contributed to the accident," and the general term sustained the instruction.

Allis *v.* Columbian University, 19 D. C., 270–273.

This duty to exercise ordinary care was repeated several times in the instructions in D. C. *v.* Ashton, 14 App. Cases D. C., 576, and the doctrine announced in that case is that where a person voluntarily exposes himself to obvious danger without necessity he is guilty of negligence as a matter of law.

D. C. *v.* Ashton, 14 App. Cases D. C., 579.

In Swart *v.* D. C., 17 App. Cases D. C., 412, the court said:

"But it does not always follow that because a trench, excavation, or pile of earth may be found in a street or highway, constituting a temporary obstruction to travel thereon,

that therefore the obstruction is unlawful, and that for all injuries that may be received by those attempting to use the street in that condition the municipality will be liable. Such excavations and piles of earth in the streets may be necessary in making the ordinary improvements of the city; such as sewers, laying of water and gas pipes, and the like; and if made for such purposes, and with ordinary care, they are not unlawful obstructions of the streets. * * * To entitle the plaintiff to recover for this injury, it must be shown that the alleged negligent defect in the street, if defect were shown to exist, was the sole cause of the injury. Where the injury follows from a defect united with some distinct efficient cause, without which it would not have happened * * * the plaintiff cannot recover."

In the same case (Swart *v.* D. C.) the Chief Justice of the Court of Appeals said, at page 412:

"It is true, every one has a right to travel the street; but it is an established principle, that a party who ventures to pass a dangerous defect or obstruction in a street or highway, knowing its condition, *is bound to exercise a degree of care proportionate to the danger.*"

In Quimby *v.* Filter, 62 N. J. L., 766, the plaintiff and wife brought an action against an abutting owner for injuries sustained by the wife through falling into an opening in the sidewalk of a public street in Jersey City, from which opening a flight of steps led to the cellar of the building owned by the defendant. The accident was due in part to the absence of guards or railings around the steps, and was necessarily submitted to the jury. Mrs. Filter (one of the plaintiffs) with a Mrs. Tietjen and her young daughter were passing along the sidewalk. It was after nightfall, but the

street was well lighted, and Mrs. Filter fell to the foot of the cellar steps and was injured.

The only witnesses to the accident called for the plaintiffs were Mrs. Filter and Mrs. Tietjen. Mrs. Filter said that she did not know how she came to fall nor from what point she fell, but in a confused and uncertain way she testified that it was the north guard-rail that was gone, and that she was close to the building when she fell. There was a difference in the testimony between the parties as to the conduct of the plaintiff, for the defendant's witnesses, in contradiction of the plaintiff's witnesses, testified that the plaintiff and party were laughing and "fooling" and pushing one another, and that Mrs. Filter fell or was pushed down the steps. The judge instructed the jury that Mrs. Filter was not bound to use ordinary care as she passed along the sidewalk, unless there was some means of warning or the "pitfall" was guarded. This instruction was afterwards modified as follows: To a request to charge that if Mrs. Filter knew of the existence of the dangerous place, or if it was open and obvious to sight, she was bound to use reasonable care to avoid the danger, the judge responded by saying that if she *saw* the dangerous place she would be bound to use ordinary care to avoid the danger. He broadened this ruling by charging a request that if she *knew or saw* the dangerous place she would be guilty of contributory negligence in not avoiding it, but, in response to a request to charge that she was guilty of contributory negligence if she did not see the "cellarway," *provided she would have seen it by exercising ordinary care,* the court refused so to charge. The appellate court, in reversing the case, observed:

"It is common knowledge that adjacent to the buildings on a city street there are various appendages for their convenient use that project into the sidewalk. *It might well be that Mrs. Filter, with due circumspection measured by the standard of ordinary care, would have avoided the accident that befell her, although she did not previously see or know exactly the danger of such an accident.*"

Quimby *v.* Filter, 62 N. J. L., 766–770.

Although a plaintiff has the right to assume that the city had performed its duty in keeping a sidewalk in safe condition, and although he is not required to anticipate danger, yet if in passing over a sidewalk he fails to exercise ordinary care he is not entitled to recover, and a judgment for a municipality will be affirmed in the absence of such ordinary care.

So, where a hole in a sidewalk was half way between two gas lamps, and not farther than 80 feet from each, and the plaintiff, who had no knowledge of its existence, walked into the hole without noticing it, the court said:

"These lamps, presumably, were burning when the accident occurred. They are usually lighted at night, and one of the plaintiff's witnesses says he thinks they were burning, and there is no evidence that they were not. * * * Indeed the plaintiff himself testifies that a man could have seen the sidewalk, the night of the accident, if he had looked at it. He does say he did not see it, but gives no reason why he did not. *Had he looked, as he ought to have done*, or, *in other words, had he exercised ordinary care—he would have seen not only the sidewalk, but the hole therein in time to have avoided the accident*" (Moore *v.* City of Richmond, 85 Va., 538, 543, 545).

If an analogous case to the one at bar is required it can be found in Dubois *v.* City of Kingston, 102 N. Y., 219. In that case the plaintiff while running at night to a fire in the direction of his own house fell over a carriage step and was injured. The court, at page 224, said:

"It may also be remarked that the evidence of the plaintiff tended strictly to show that he was chargeable with negligence which contributed to the injury. There was abundant room for him to pass by the stepping stone without running against it. A very small portion of the end of the stone upon which he fell obstructed the sidewalk, and being well acquainted with the locality *had he been careful in exercising his faculties he could have avoided the accident.*"

In a like recent case, *where the plaintiff was walking rapidly and was injured by falling over a carriage step*, the court said:

"It is true that the plaintiff was injured, but that was the result of an accident, due possibly to his own fault."

Robert *v.* Powell, 168 N. Y., 415.

Where a traveler riding with another as his guest on a dark night, along an unlighted street, with an equal opportunity to discover and avoid danger and with equal knowledge that they were driving at a reckless speed, is injured by collision with a water hydrant at its proper place in the street he is guilty of such negligence as precludes a recovery against the city (City of Vincennes *v.* Thuis (Indiana), 63 N. E. Rep., 315, 317).

Counsel for the plaintiff in error relied in the court below on sections 232, 233, and 234 of the R. S. U. S. relating to the D. C., which read as follows:

"SEC. 232. The avenue and street lamps in the city of Washington shall be kept lighted with six-feet burners twenty-one nights in each month from dark until daylight.

"SEC. 233. The proper authorities are directed to increase from time to time, as the public good may require, the number of street lamps on any of the streets, lanes, alleys, public ways, and grounds, in the city of Washington, and to do any and all things pertaining to the well lighting of the city, and to levy and collect a tax from the property-holders sufficient to defray the expenses thereof.

"SEC. 234. In event of the failure of the proper authorities to levy and collect the tax or to light the city as directed by the two preceding sections, the Secretary of the Interior shall levy and collect such tax sufficient to light the city and to fully execute the provisions of the two preceding sections."

The claim was that these provisions cast a duty upon the District authorities to light the place where this stone lay. It is sufficient to note, we think, that the corporation of Washington was authorized by these sections to levy a tax upon the property-holders sufficient to pay for lamp-lighting. No such authority existed at the time of the accident to the plaintiff in error. Since the act providing for a permanent form of government for the District of Columbia, approved June 11, 1878, the Commissioners are directed "to apply the taxes and other revenues of said District to the payment of the current expenses thereof; to the support of the public schools, the fire department and the police."

The Commissioners are also required at the end of each fiscal year to submit to the Secretary of the Treasury a "statement showing detail of the work proposed to be done

by them during the fiscal year next ensuing and the estimated costs thereof."

The Secretary of the Treasury is required to consider these estimates and approve or disapprove them, and the whole is to be transmitted to Congress.

The act also provides:

"To the extent to which Congress shall approve said estimates, Congress shall appropriate the amount of fifty per centum thereof, and the remaining fifty per centum of such approved estimates shall be levied and assessed upon the taxable property and privileges in said District other than the property of the United States and of the District of Columbia."

Since the above-mentioned act Congress has, each year, provided specifically for gas-lighting in the District of Columbia, and has changed and fixed the rates of payment of the public service corporation, which has a monopoly of the gas franchise in the District of Columbia.

It is submitted that whatever the Commissioners have done or may do in locating lamps is a matter of administration for which the municipality is not to be held responsible respecting any omission of duty on the part of its officers.

On the whole case, we submit that there is no error in the record, and that the judgment of the Court of Appeals of the District of Columbia should be affirmed.

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Supreme Court of the United States.

No. 62.—October Term, 1904.

Abraham Wolff, Plaintiff in Error, *vs.* The District of Columbia. } In error to the Court of Appeals of the District of Columbia.

[January 3, 1905.]

Mr. Justice McKenna delivered the opinion of the Court.

This is an action for damages for injury caused to plaintiff in error (who was also plaintiff below) by an alleged negligent omission of duty by the District of Columbia.

On the 27th of October, 1895, about nine o'clock in the evening, plaintiff had occasion to visit Sangerbund Hall, a house on C street, in the city of Washington. On coming out, and for the purpose of approaching a wagon which was standing in the street, he walked rapidly across the sidewalk and, by falling over a block of stone called a stepping stone or carriage step, which was on the sidewalk near the curb, broke his leg. Some time subsequently he was compelled to submit to its amputation.

The charge against the city was that it was a body corporate and municipal, and had the power, and was its duty, to keep the sidewalks free of obstructions and nuisances, one of which, it was alleged, said stone was. And further, that it was the duty of the District of Columbia to keep the streets properly lighted. In neglect of both, it was alleged, it did "allow and suffer" the stone to be securely fastened into and remain upon the sidewalk, and did "keep and continue" it there during the night-time of the 27th of October, without a light to show its presence or a watchman to notify wayfarers of its existence. Damages were laid at $25,000. The District of Columbia pleaded not guilty. A jury was impanelled. At the conclusion of the testimony the District moved the court to instruct a verdict for it on the ground that the plaintiff had not made out a case. The motion was granted, and a verdict in accordance with the instructions. A motion for a new trial was made and denied, and the case was then taken to the Court of Appeals, which affirmed the judgment of the court below. (21 D. C. App. Cases, 464.)

The first contention of plaintiff in error is that the stone was an unlawful obstruction, *per se*. This is deduced as a consequence from section 222 of the Revised Statutes of the District of Columbia, which reads as follows:

"No open space, public reservation, or other public grounds in the city of Washington, nor any portion of the public streets and avenues of said city, shall be occupied by any private person or for any private purpose whatever."

This section cannot be construed to prohibit putting upon a street any object without regard to its effect on the use of the street. The sweeping character of such a construction need not be pointed out. There are objects which subserve the use of streets and cannot be considered obstructions to them, although some portion of their space may be occupied. This is illustrated by a number of cases.

In *Dubois* v. *City of Kingston*, (102 N. Y. 219,) a stepping stone three feet four inches in length and twenty inches wide was placed on the edge of the sidewalk. The court observed that the stone was not of unusual size or located in an improper place, and that it would be extending the liability of cities too far to hold them liable for permitting stepping stones on the edge of sidewalks.

Robert v. *Powell*, (168 N. Y. 411,) was also an action for injuries caused by a stepping stone. The court said: "There are some objects which may be placed in or exist in a public street, such as hydrants, hitching posts, telegraph posts, awning posts or stepping stones, such as the one described in this case, which cannot be held to constitute a nuisance. They are in some respects incidental to the proper use of the streets as to a highway. . . . The stepping stone in this case, located upon the sidewalk in front of a private house, was a reasonable and necessary use of the street, not only for the convenience of the owner of the house, but for other persons who desired to visit or enter the house for business or other lawful purposes."

It was further remarked: "The question involved in this class of cases is, whether an object complained of is usual, reasonable or necessary in the use of the street by the owner of the premises, or any one else."

City of Cincinnati v. *Fleisher, Ad'm.*, (63 Ohio, 229, 234,) also passed upon a city's liability for the existence of a stepping stone upon a sidewalk. The court said: "It [the stone] was within that portion of the street by the curb, which, according common usage, is devoted to carriage blocks, lamps, hitching posts and shade trees, which pedestrians of ordinary care observe and avoid." And *Elster* v. *Springfield* was quoted, to the effect that "the laying of sewers, like that of gas and water pipes, beneath the soil, and the erection of lamps and hitching posts, etc., upon the sufaces, is a street use, sanctioned as such by their obvious purpose and long-continued usage."

It was held in *Macomber* v. *City of Taunton*, (100 Mass. 225,) that a hitching post was not a defect in the highway for which the city was liable for permitting it to remain.

Plaintiff in error cites *City of Scranton* v. *Callerson*, (94 Pa. 203,) and *Davis* v. *City of Austin*, (22 Texas Civ. App. 460.)

In the first case, an iron water plug in the middle of a street and projecting above its surface, was held to be a nuisance. Obviously the case is not in point. The second case sustains the contention of plaintiff in error, but cannot be followed against the authority and reasoning of the other cases.

2. The second contention of plaintiff in error is that it was the duty of the District of Columbia to so light the street as to show the presence of the stone thereon, the District having full knowledge thereof. This duty is made to rest mainly upon section 233 of the Revised Statutes of the District of Columbia, which is as follows:

"The proper authorities are directed to increase, from time, as the public good may require, the number of street lamps on any of the streets, lanes, alleys, public ways and grounds in the city of Washington, and to do any and all things pertaining to the well lighting of the city."

This, in one sense, is but another form of the first contention. The duty of a city to especially illuminate a place where an object is, or to put a policeman on guard by it to warn pedestrians, depends upon the object being an unlawful obstruction.

The plaintiff in error can claim nothing from the general duty of the city under the statute to light the streets. The exercise of such duty was necessarily a matter of judgment and discretion, depending upon considerations which this record does not exhibit.

Judgment affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.